250 N.C. App.—No. 3 Pages 308-510

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

FEBRUARY 14, 2019

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OF
NORTH CAROLINA

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[1]Sworn in 1 January 2017 [2]Sworn in 1 January 2017 [3]Appointed 24 April 2017
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COURT OF APPEALS

CASES REPORTED

FILED 15 NOVEMBER 2016

CASES REPORTED WITHOUT PUBLISHED OPINIONS

SCHEDULE FOR HEARING APPEALS DURING 2018

NORTH CAROLINA COURT OF APPEALS

Cases for argument will be calendared during the following weeks in 2018:

January 8 and 22

February 5 and 19

March 5 and 19

April 2, 16 and 30

May 14

June 4

July None

August 6 and 20

September 3 and 17

October 1, 15 and 29

November 12 and 26

December 10

Opinions will be filed on the first and third Tuesdays of each month.

ALLIED SPECTRUM, LLC, D/B/A APEX CROWN EXPRESS; PLAINTIFF
v.
GERMAN AUTO CENTER, INC.; MOHAMED ALI DARAR; AND
REEM TAMIM DARAR; DEFENDANTS

No. COA16-283

Filed 15 November 2016

1. Civil Procedure—summary judgment—voluntary dismissal—rested case

The trial court did not err in a case involving alleged false and misleading representations regarding a lease agreement by granting summary judgment in favor of defendants following plaintiff's filing of a notice of voluntary dismissal. Plaintiff had rested its case and lost its absolute right to voluntarily dismiss the case.

2. Contracts—breach of contract—breach of lease agreement—summary judgment—sufficiency of evidence

The trial court did not err in a case involving alleged false and misleading representations regarding a lease agreement by granting summary judgment in favor of defendants. Plaintiff failed to meet its burden of demonstrating the existence of a genuine issue of material fact.

Judge TYSON dissenting.

Appeal by plaintiff from order entered 7 July 2015 by Judge Paul G. Gessner in Wake County Superior Court. Heard in the Court of Appeals 7 September 2016.

Bratcher Adams PLLC, by Brice Bratcher and J. Denton Adams, for plaintiff-appellant.

Austin Law Firm, PLLC, by John S. Austin, for defendant-appellees.

CALABRIA, Judge.

After plaintiff rested its case, it did not have an absolute right to voluntarily dismiss its complaint, and the trial court did not err in entering summary judgment. Where defendants supported their motion for summary judgment with affidavits, and plaintiff has failed to meet its burden on appeal of specifically showing the existence of a genuine issue of

material fact, the trial court did not err in granting summary judgment in favor of defendants.

I. Factual and Procedural Background

In early 2013, German Auto Center, Inc. ("German") entered into negotiations with Kargo Corporation ("Kargo") concerning the sale of a gas station business located in Apex, North Carolina, and on 4 April 2013, Kargo contracted to purchase the gas station from German. The contract was signed by Kokila Amin ("Amin") on behalf of Kargo. Subsequently, Kargo transferred its interests to its successor at interest, Allied Spectrum, LLC ("plaintiff"). Amin, who had signed the contract on behalf of Kargo, was also a manager of plaintiff. On 1 May 2013, Kargo and German executed a lease agreement concerning the property on which the gas station was located. This lease was amended on the same day, and Amin's signature appears on both the agreement and the amendment. Physical possession of the property was delivered to plaintiff on 1 May 2013.

On 31 July 2014, plaintiff brought the instant action against German, its vice president Mohamed Ali Darar, and its president Reem Tamim Darar (collectively, "defendants"). Plaintiff's verified complaint alleged six counts of breach of contract, one count of breach of lease, one count of fraud in the inducement, one count of civil conspiracy, and one count of unfair and deceptive practices; and sought a declaratory judgment declaring the purchase agreement unenforceable, quantum meruit, and to pierce the corporate veil. Specifically, this complaint alleged that defendants, in the lease agreement, agreed to grant plaintiff a rent credit if plaintiff opened a food service business on the premises; that plaintiff installed equipment for food service and began serving food to customers; and that defendants subsequently refused to apply that credit. The complaint further alleged that on 1 July 2013, the Wake County Revenue Department issued a tax bill on the property showing a roughly 26% increase on property taxes; that on 11 March 2013, the Apex Planning & Community Development Department issued a notice of violation to defendants for various violations of unapproved site work; that because of these and other violations, the property was not issued a Certificate of Occupancy by the Town of Apex until 10 December 2013; that Kargo's application for an Alcoholic Beverage Permit was approved for Kargo but denied for the location due to defendants' failure to comply with Town of Apex building codes; that on 30 April 2013, defendants received a notice from the North Carolina Department of Environment and Natural Resources, Division of Waste Management, Underground Storage Tank Section ("DENR") listing ten different violations of North

Carolina code and law on the property; that neither Kargo nor plaintiff were informed of these violations prior to 5 May 2013; and that despite numerous demands by plaintiff, multiple issues with the location that existed prior to closing were not addressed by defendants, resulting in months of delay in plaintiff opening its business.

On 30 September 2014, defendants filed a verified answer to plaintiff's complaint, asserting three affirmative defenses of breach of contract, as well as waiver and estoppel, due diligence, and failure to join necessary parties. The answer also included a motion to dismiss. On 18 February 2015, defendants filed an amended answer and motion to dismiss, ostensibly alleging (but containing no arguments concerning) the defenses of accord and satisfaction, estoppel, injury by fellow servant, and release and waiver. The motion for dismissal was specifically sought pursuant to Rules 12(b)(6) (failure to state a claim) and 12(b)(7) (failure to join necessary parties) of the North Carolina Rules of Civil Procedure.

In April of 2015, defendants filed a motion for summary judgment, alleging that no genuine issues of material fact existed, and a motion to compel plaintiff to respond to defendants' first set of interrogatories. Defendants also filed a request for production of documents, or alternatively to dismiss for failure to prosecute. Plaintiff filed a motion to continue trial, contending that no pre-trial conferences had been held, no pre-trial orders had been entered, and discovery was still ongoing.

On 29 April 2015, the trial court held a hearing on defendants' motion for summary judgment. At the close of the hearing, the trial court took the matter under advisement to provide the parties the opportunity to present supplemental materials and arguments regarding the validity of the purported verification of the complaint. These materials were due the following day, 30 April 2015. However, on 30 April 2015, plaintiff filed a notice of voluntary dismissal without prejudice.

On 7 July 2015, the trial court entered an order on defendants' motion for summary judgment, first noting that, subsequent to the hearing, plaintiff filed a notice of voluntary dismissal. The trial court held that the notice of voluntary dismissal "does not divest this Court of ruling on [a] Motion for Summary Judgment, but the Court will consider any claims surviving the Motion for Summary Judgment to be voluntarily dismissed without prejudice." The trial court granted summary judgment in favor of defendants and dismissed plaintiff's claims with prejudice.

On 4 August 2015, plaintiff filed notice of appeal from the trial court's order granting summary judgment in favor of defendants. On

11 September 2015, the trial court entered an order extending the time in which plaintiff could serve the record on appeal.

Plaintiff appeals.

II. Standard of Review

"Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that 'there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.' " *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (quoting *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007)).

III. Analysis

Although plaintiff raises two arguments on appeal, they are both fundamentally the same argument, to wit: that the trial court erred in granting summary judgment in favor of defendants. We disagree.

A. Voluntary Dismissal

[1] First, plaintiff contends that the trial court erred in granting summary judgment in favor of defendants following plaintiff's filing of a notice of voluntary dismissal. "[A] plaintiff is vested with the authority to dismiss any of its claims prior to close of its case-in-chief." *Roberts v. Young*, 120 N.C. App. 720, 726, 464 S.E.2d 78, 83 (1995). Plaintiff contends that it had not rested its case when the notice of voluntary dismissal was filed, and that it was therefore entitled to voluntarily dismiss the complaint at any time.

The pivotal issue is whether plaintiff had rested its case. This Court has previously held that, "[w]here a party appears at a summary judgment hearing and produces evidence or is given an opportunity to produce evidence and fails to do so, and the question is submitted to the court for decision, he has 'rested his case' within the meaning of Rule 41(a)(1)(i) of the North Carolina Rules of Civil Procedure. He cannot thereafter take a voluntary dismissal under Rule 41(a)(1)(i)." *Maurice v. Hatterasman Motel Corp.*, 38 N.C. App. 588, 591-92, 248 S.E.2d 430, 432-33 (1978). Thus, the question is whether plaintiff had rested its case at the close of the 29 April 2015 hearing on defendants' motion for summary judgment.

Plaintiff contends that the hearing had not concluded. Specifically, plaintiff notes that the trial court chose to "take the matter under advisement[,]" and offered the parties the opportunity "to provide . . .

supplemental case law" to the court. However, upon examination of the transcript, we disagree.

At the hearing, plaintiff made extensive arguments that "what this complaint hinges on[] is whether these false and misleading representations were made[,]" and that this was a "clear-cut factual issue." Plaintiff asserted that "these factual issues would be better suited to be resolved at trial and not in a summary judgment issue." Defendants were permitted to respond, after which plaintiff spoke once again. When plaintiff's counsel finished speaking this time, counsel stated, "I have no further comments[.]" In response, the trial court stated the following:

> Um, I'm going to take the matter under advisement. I know time is of the essence, but I want to provide you an opportunity, if you choose, to provide for me supplemental case law solely on the issue of the validity of the purported verification in the complaint – of the complaint. Um, and I would like that by noon tomorrow.

Upon review, we find plaintiff's argument unconvincing. It is clear that plaintiff was afforded the opportunity to argue the issue of summary judgment, and in fact did so. At the conclusion of plaintiff's argument, plaintiff explicitly stated that it "[had] no further comments[,]" a phrase typically used to indicate that a party was resting its case. Further, the trial court foreclosed any further evidence, stating that the sole remaining matter before the court was the validity of plaintiff's purported verification. Given this context, we hold that plaintiff had, at the close of the hearing, rested its case. "[A]fter resting his case, a plaintiff forfeits the absolute right to take a dismissal." *Pardue v. Darnell*, 148 N.C. App. 152, 155, 557 S.E.2d 172, 174 (2001). We hold that, because plaintiff had rested its case and lost its absolute right to voluntarily dismiss the case, the trial court did not err in entering an order on defendants' summary judgment motion.

This argument is without merit.

B. Summary Judgment

[2] Second, plaintiff contends that the trial court erred in granting summary judgment in favor of defendants. Plaintiff contends, specifically, that the trial court erred in upholding defendants' objection to plaintiff's verified complaint.

In its argument on appeal, plaintiff contends that "[t]he Complaint sets forth facts with great specificity that would be admissible at trial[,]" and that "had the verified complaint been treated as an affidavit, . . . then

there would have been genuine issues of material fact present warranting a denial of Defendants' Motion." However, plaintiff does not allege what *specific* issue of material fact would have been created were the complaint to be treated as an affidavit.

"A party moving for summary judgment may prevail if it meets the burden (1) of proving an essential element of the opposing party's claim is nonexistent, or (2) of showing through discovery that the opposing party cannot produce evidence to support an essential element of his or her claim." *Lowe v. Bradford*, 305 N.C. 366, 369, 289 S.E.2d 363, 366 (1982). "If the moving party meets this burden, the non-moving party must in turn either show that a genuine issue of material fact exists for trial or must provide an excuse for not doing so." *Id.* Thus, the burden on plaintiff, at trial and now on appeal, is to show the existence of a genuine issue of material fact. Further, under this burden, "the plaintiff may not rely upon the bare allegations of his complaint to establish triable issues of fact, but must, by affidavits or otherwise, as provided by Rule 56, set forth specific facts showing that there is a genuine issue for trial." *Haithcock v. Chimney Rock Co.*, 10 N.C. App. 696, 699, 179 S.E.2d 865, 867 (1971).

On appeal, plaintiff has the burden of establishing "specific facts showing that there is a genuine issue for trial." Plaintiff's argument, however, is purely procedural; plaintiff contends that the trial court erred in declining to treat its verified complaint as an affidavit. The only argument plaintiff offers on genuine issues of material fact is a passing, bare assertion that "there would have been genuine issues of material fact present[,]" absent any supporting explanation, arguments, or citations.

We hold that plaintiff has failed to meet its burden on appeal of demonstrating the existence of a genuine issue of material fact. Therefore, the trial court's order is affirmed.

AFFIRMED.

Judge DAVIS concurs.

Judge TYSON dissents in a separate opinion.

TYSON, Judge, dissenting.

The majority's opinion concludes Plaintiff's voluntary dismissal without prejudice was ineffective to terminate the case and, consequently, the

trial court continued to possess jurisdiction to determine whether summary judgment was appropriate. The majority next concludes Plaintiff did not meet its burden on appeal of demonstrating the existence of genuine issues of material fact. As such, the majority holds Plaintiff's argument the trial court erred in refusing to treat the verified complaint as an affidavit is immaterial. I disagree and respectfully dissent.

Plaintiff properly filed and entered its voluntary dismissal without prejudice prior to resting its case. *See Wesley v. Bland*, 92 N.C. App. 513, 515, 374 S.E.2d 475, 476-77 (1988) (holding plaintiffs had not rested where attorney took a voluntary dismissal in lieu of arguing). This entry of dismissal, prior to Plaintiff resting its arguments and the trial court's ruling on summary judgment, deprived the court of jurisdiction to enter the summary judgment order. N.C. Gen. Stat. § 1A-1, Rule 41(a)(1) (2015).

In the alternative, under *de novo* review, the order granting Defendants' motion for summary judgment was error, since Defendants failed to meet their burden of showing no genuine issues of fact existed to demonstrate they were entitled to judgment as a matter of law. Plaintiff's complaint was properly verified and is properly treated as an affidavit. The trial court erroneously concluded the pleadings, arguments, and affidavits failed to show any genuine issues of material fact. I vote to reverse the trial court's order and remand for entry of Plaintiff's voluntary dismissal. In the alternative, I vote to reverse the trial court's entry of summary judgment for Defendants and remand for trial.

I. Voluntary Dismissal

The majority's opinion asserts Plaintiff had rested its case at the close of the summary judgment hearing held on 29 April 2015. I disagree.

Under Rule 41(a)(1)(i) of the North Carolina Rules of Civil Procedure, a plaintiff may file for a voluntary dismissal, without prejudice, any time before resting its case. N.C. Gen. Stat. § 1A-1, Rule 41(a)(1)(i) (2015); *see Roberts v. Young*, 120 N.C. App. 720, 726, 464 S.E.2d 78, 83 (1995) ("[A] plaintiff is vested with the authority to dismiss any of its claims prior to close of its case-in-chief."). Rule 41 "offers a safety net to plaintiff or his counsel who are either unprepared or unwilling to proceed with trial the first time the case is called." 2 G. Gray Wilson, North Carolina Civil Procedure § 41-1, at 41-3 (3d ed. 2007).

If a plaintiff has rested its case, a voluntary dismissal without prejudice may only be entered by stipulation of the parties or by court order. N.C. Gen. Stat. § 1A-1, Rule 41(a)(1) and (a)(2) (2015). For the purposes of summary judgment,

> [t]he record must show that plaintiff has been given the opportunity at the hearing to introduce any evidence relating to the motion and to argue his position. *Having done so and submitted the matter to the [trial court] for determination*, plaintiff will then be deemed to have "rested his case" for the purpose of summary judgment and will be precluded thereafter in dismissing his case pursuant to Rule 41 during the pendency of the summary judgment motion.

Wesley, 92 N.C. App. at 515, 374 S.E.2d at 477; *see also Alston v. Duke Univ.*, 133 N.C. App. 57, 61-62, 514 S.E.2d 298, 301 (1999) (holding the plaintiff had not rested where the attorney took a voluntary dismissal after the court ruled on a related discovery motion, but before the attorney had argued against summary judgment); *but see Maurice v. Hatterasman Motel Corp.*, 38 N.C. App. 588, 591-92, 248 S.E.2d 430, 432-33 (1978) (holding the plaintiff could not enter a voluntary dismissal after the trial court signed the summary judgment order, but before the order had been filed).

Although Plaintiff in this case presented arguments and a verified pleading as an affidavit to the trial court at the summary judgment hearing on 29 April 2015, Plaintiff had not rested and the case was not submitted to the trial court for final determination. These facts are distinguishable from *Maurice*, wherein this Court held the purported voluntary dismissal was improper once the trial court had already signed the motion at the close of the summary judgment hearing. *Maurice*, 38 N.C. App. at 591-92, 248 S.E.2d at 432-33.

After Plaintiff's final response to Defendants' argument at the summary judgment hearing, the trial court did not rule and still questioned whether the complaint was properly verified. This query was a key issue in the ultimate determination of summary judgment, as the verified complaint and Defendants' responses show genuine issues of material fact existed.

Instead of ruling on the summary judgment motion at the close of the hearing, the trial court expressly provided Plaintiff the opportunity to provide supplemental case law on the requirements of a verified complaint and left the matter open until noon of the next day. Rather than providing the case law or other authority and submitting the matter to the court for final determination, Plaintiff properly invoked the "safety net" provided in Rule 41(a)(1) and voluntarily dismissed its case without prejudice. *See* 2 G. Gray Wilson, North Carolina Civil Procedure § 41-1, at 41-3.

Since Plaintiff had not rested its case at the time it submitted and entered its voluntary dismissal, the trial court was divested of jurisdiction, and it had no power or authority to enter the order and grant Defendants' motion for summary judgment. *See Wesley*, 92 N.C. App. at 515, 374 S.E.2d at 477.

II. Summary Judgment

The majority's opinion next asserts Plaintiff failed to meet its burden on appeal of demonstrating genuine issues of material fact and that the trial court did not err in granting summary judgment in favor of Defendants. I disagree.

We review an appeal from summary judgment *de novo*. *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008). Summary judgment is only appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2015). When considering a motion for summary judgment, the trial court views the evidence in a light most favorable to the nonmoving party and resolves all inferences against the moving party. *See In re Will of Jones*, 362 N.C. at 573, 669 S.E.2d at 576; *Baumann v. Smith*, 298 N.C. 778, 782, 260 S.E.2d 626, 628 (1979).

"Summary judgment is a somewhat drastic remedy, [that] must be used with due regard to its purposes and a cautious observance of its requirements in order that no person shall be deprived of a trial on a genuine disputed factual issue." *Draughon v. Harnett Cnty. Bd. of Educ.*, 158 N.C. App. 208, 211-12, 580 S.E.2d 732, 735 (2003) (internal quotation marks and citation omitted), *aff'd*, 358 N.C. 381, 591 S.E.2d 521 (2004).

North Carolina precedents consistently hold summary judgment is inappropriate "where matters of credibility and determining the weight of the evidence exist." *Id.* at 212, 580 S.E.2d at 735. For example, summary judgment is generally inappropriate in actions for fraud or other tortious conduct. *See Isbey v. Cooper Companies, Inc.*, 103 N.C. App. 774, 776, 407 S.E.2d 254, 256 ("Although summary judgment may be proper when absence of genuine issue is clearly established, summary judgment is generally improper in an action for fraud."), *disc. review denied*, 330 N.C. 613, 412 S.E.2d 87 (1991); *Smith-Douglass, Div. of Borden Chemical, Borden, Inc. v. Kornegay*, 70 N.C. App. 264, 266, 318 S.E.2d 895, 897 (1984) ("Questions of fraudulent intent ordinarily go to the jury on circumstantial evidence, and summary judgment is usually inappropriate.").

A. Defendants' Burden on Summary Judgment

The majority's opinion addresses Plaintiff's burden on appeal without first addressing whether Defendant initially met its burden at trial. My review demonstrates Defendants failed to show no genuine issues of material fact existed.

Irrespective of which party has the burden of proof at trial, for the purposes of summary judgment, "[t]he movant always has the burden of showing that there is no triable issue of fact and that he is entitled to judgment as a matter of law." *Baumann v. Smith*, 298 N.C. 778, 781, 260 S.E.2d 626, 628 (1979); *see Draughon*, 158 N.C. App. at 212, 580 S.E.2d at 735. As the Supreme Court has held:

> If the movant's forecast [of evidence which he has available for presentation at trial] fails to do this, summary judgment is not proper, whether or not the opponent responds. . . . The evidentiary matter supporting the moving party's motion may not be sufficient to satisfy his burden of proof, even though the opposing party fails to present any competent counter-affidavits or other materials.

Savings & Loan Ass'n v. Trust Co., 282 N.C. 44, 51-52, 191 S.E.2d 683, 688 (1972) (internal quotation marks and citations omitted); *see Baumann*, 298 N.C. at 781, 260 S.E.2d at 628.

In *Baumann*, this Court held the defendants failed to meet this burden when they submitted a supporting affidavit, which "merely reaffirmed certain paragraphs of the verified answer and stated that defendants entered into an agreement with [a third party.]" *Baumann*, 298 N.C. at 782, 260 S.E.2d at 628. This Court emphasized the defendants' affidavit "did not challenge or alter the fact that the complaint alleged, and the answer denied, the existence of a contract between the parties." *Id.* at 782, 260 S.E.2d. at 628-29. This Court held summary judgment was inappropriate, whether or not the plaintiff properly responded. *Id.* at 781-82, 260 S.E.2d. at 628-29; *see Savings & Loan Ass'n.*, 282 N.C. at 51-52, 191 S.E.2d at 688.

Upon *de novo* review, Defendants in this case failed to meet their burden of demonstrating no genuine issues of material fact existed. In support of their motion for summary judgment, Defendants submitted two affidavits. Like in *Baumann*, Defendants' affidavits merely reaffirmed statements and allegations contained within their amended answer, and each affidavit failed to provide any additional evidence in

support of their motion for summary judgment. *See Baumann*, 298 N.C. at 782, 260 S.E.2d at 628.

The affidavit of Defendant-Reem Tamim Darar simply re-asserts the amended answer's denial that she "did not make any false or misleading statements to Plaintiff, its predecessors or their agents." Her affidavit confirms she exchanged an email communication with Plaintiff regarding Defendants' failure to respond to Plaintiff's email, but asserts she had no "material communications" regarding the sale of the premises to Plaintiff. Her affidavit offers no substantive evidence to demonstrate that Ms. Darar is entitled to summary judgment and leaves open genuine issues of material fact of "material communications" for the jury. *See id.*

While Defendant-Mohamed Ali Darar's affidavit is slightly more detailed than Ms. Darar's affidavit, it is also a mere denial of allegations in Plaintiff's complaint, which were previously denied in Defendants' amended answer. The affidavit did not offer or assert any uncontested facts or provide any new or substantive evidence to show no genuine issues of material fact existed in the many claims Plaintiff asserted against Defendants. The affidavit also did not assert any facts to shift the burden back on to Plaintiff. Each of the Defendants' affidavits are ultimately nothing more than re-statements of what they previously denied in their amended motion to dismiss and answer and, in fact, now admit asserted, but disputed, communications, which occurred between the parties.

Furthermore, many of Plaintiff's claims against Defendants are based upon allegations of fraud. As noted previously, such claims are generally not appropriate for summary judgment. *See Isbey*, 103 N.C. App. at 776, 407 S.E.2d at 256; *Smith-Douglass*, 70 N.C. App. at 266, 318 S.E.2d at 897. Since the evidence presented must be viewed in the light most favorable to the Plaintiff, as the non-moving party, and since Defendants' affidavits operate as mere affirmations of statements previously made in their amended motion to dismiss and answer, Defendants failed to meet their burden to show that no genuine issues of material fact existed to allow summary judgment to be appropriately entered against Plaintiff. *See Baumann*, 298 N.C. at 781, 260 S.E.2d at 628. The trial court erred in granting Defendants' motion for summary judgment.

B. Verification of a Complaint and Complaint as Affidavit

Since we review summary judgment motions *de novo* and Defendants, in this case, did not meet their initial burden on summary judgment, the majority errs by holding Plaintiff failed to meet its burden on appeal to show that genuine issues of material fact existed and that Plaintiff's

argument the trial court erred by refusing to treat the verified complaint as an affidavit is immaterial. *Baumann* and *Savings & Loan Ass'n* clearly state if the moving party does not meet its burden, then whether the non-moving party properly responds is immaterial. *See Savings & Loan Ass'n*, 282 N.C. at 51-52, 191 S.E.2d at 688; *Baumann*, 298 N.C. at 782, 260 S.E.2d at 628. However, I briefly address Plaintiff's arguments to show its complaint was properly verified and could be treated as an affidavit.

A verified complaint must contain a statement "that the contents of the pleading verified are true to the knowledge of the person making the verification, except as to those matters stated on information and belief, and as to those matters he believes them to be true. Such verification shall be by affidavit of the party[.]" N.C. Gen. Stat. §1A-1, Rule 11(b) (2015). Plaintiff's complaint clearly meets this requirement.

Ms. Amin attached a separate, signed and notarized verification to the complaint, which stated "[t]hat the contents of the foregoing complaint are true to her *own knowledge*, except as to the matter stated on information and belief, and as to those matters she believes them to be true." (emphasis supplied). This language virtually mirrors the requirement for verification as listed in Rule 11. *Id.* Furthermore, as Plaintiff notes, this language was taken directly from *Thorp's N.C. Trial Practice Forms*. 1 Thorp's N.C. Trial Prac. Forms § 11:2 (7th ed.). This language has also repeatedly been upheld as sufficient to verify a complaint. *See e.g.*, *Bauer v. Douglas Aquatics*, *Inc.*, 207 N.C. App. 65, 69, 698 S.E.2d 757, 761-62 (2010); *In re Dj.L.*, 184 N.C. App. 76, 82, 646 S.E.2d 134, 139 (2007); *In re D.D.F.*, 187 N.C. App. 388, 390, 654 S.E.2d 1, 2 (2007).

Since the complaint is verified, the question becomes whether the verified complaint may be treated as an affidavit to rebut Defendants' motion at the summary judgment hearing.

Rule 56 of the North Carolina Rules of Civil Procedure does not allow an adverse party to:

> rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

N.C. Gen. Stat. § 1A-1, Rule 56(e) (2015). Our Supreme Court has held the purpose of these sentences "is to pierce *general allegations* in the nonmovant's pleadings, Rule 56(e) does not deny that a properly verified

pleading which meets all the requirements for affidavits may effectively set forth specific facts showing that there is a genuine issue for trial." *Schoolfield v. Collins*, 281 N.C. 604, 612, 189 S.E.2d 208, 212-13 (1972) (emphasis in original) (internal quotations and citations omitted).

A trial court may consider a party's verified complaint as an affidavit if it, "(1) is made on personal knowledge, (2) sets forth such facts as would be admissible in evidence, and (3) shows affirmatively that the affiant is competent to testify to the matters stated therein." *Page v. Sloane*, 281 N.C. 697, 705, 190 S.E.2d 189, 194 (citations omitted). Generally, trial courts may not consider portions of an affidavit not based on the affiant's personal knowledge. *Moore v. Coachman Industries, Inc.*, 129 N.C. App. 389, 394, 499 S.E.2d 772, 776 (1998).

This Court has held:

> [a]lthough a Rule 56 affidavit need not state specifically it is based on "personal knowledge," its content and context must show its material parts are founded on the affiant's personal knowledge. Our courts have held affirmations based on "personal[ ] aware[ness]," "information and belief," and what the affiant "think[s]," do not comply with the "personal knowledge" requirement of Rule 56(e). Knowledge obtained from the review of records, qualified under Rule 803(6), constitutes "personal knowledge" within the meaning of Rule 56(e).

Hylton v. Koontz, 138 N.C. App. 629, 634-35, 532 S.E.2d 252, 256 (2000) (citations omitted), *disc. review denied*, 353 N.C. 373, 546 S.E.2d 603 (2001).

In *Charlotte-Mecklenburg Hosp. Authority v. Talford*, 366 N.C. 43, 49-50, 727 S.E.2d 866, 870-71, *reh'g denied*, 366 N.C. 248, 728 S.E.2d 354 (2012), the plaintiff submitted an affidavit from its Director of Revenue stating the amount the plaintiff charged the defendant was reasonable for the same reasons as stated in its verified complaint. The complaint was verified by the plaintiff's Manager of Patient Financial Service, Legal Accounts.

The Supreme Court held:

> These affidavits do not say expressly that the affiant is familiar either with the amounts other similar facilities charge for medical services or with various published billing regulations and guidelines. Nor do they provide itemized comparisons of the amounts plaintiff charged for a

> particular service and either the amounts other facilities charge for the same service or any applicable regulations or guidelines regarding such charges. *Nonetheless, because of the affiants' positions in plaintiff's organization, we may infer that they have the requisite personal knowledge of those matters and would be competent to give the testimony contained in their affidavits.*

Id. at 50, 727 S.E.2d at 871 (emphasis supplied). Although the Supreme Court noted the better practice is not to leave it to the court to make inferences, the Court held because of the affiants' position within the plaintiff's company, the verified complaint met the three-prong requirement to be considered by the Court as an affidavit sufficient to oppose summary judgment. *Id.*

Here, the trial court did accept and treat portions of the verified complaint as an affidavit. While the trial court did not delineate which portions of the verified complaint it relied upon and which it did not, the court is not required to do so to determine summary judgment. *See In re Cook*, 37 N.C. App 575, 579, 246 S.E.2d 801, 804 (1978) ("Where both competent and incompetent evidence is before the trial court, we assume that the trial court, when functioning as the finder of facts, relied solely upon the competent evidence and disregarded the incompetent evidence." (citation omitted)).

Here, the trial court correctly held portions of the complaint may be treated as an affidavit. The statements made "upon information and belief" included within the verified complaint "do not comply with the 'personal knowledge' requirement." *Asheville Sports Properties, LLC v. City of Asheville*, 199 N.C. App. 341, 345, 683 S.E.2d 217, 220 (2009). Contrary to Defendants' assertions the complaint is "replete" with allegations made upon information and belief, only eight of the nearly two hundred allegations were qualified with this or language similar to "made upon information and belief." *See id.* The remaining allegations in the complaint are based on Ms. Amin's personal knowledge and the complaint and its attached and incorporated exhibits affirmatively show Ms. Amin was competent to testify concerning these matters.

First, many of the exhibits attached and incorporated into Plaintiff's complaint were personally signed by Ms. Amin in her role as a managing member and secretary of Plaintiff. These exhibits include the executed Offer to Purchase and Sale of Business Agreement, a list of inventory, a summary of payments from Plaintiff to Defendants, and the executed Triple Net Lease Agreement. Each of these exhibits serve as foundations

and proof to support many of Plaintiff's claims against Defendants. Ms. Amin's signature on these documents demonstrates her personal knowledge of the issues and affirmatively shows that she is competent to testify on these matters.

Second, Ms. Amin's signature on the attached documentary exhibits shows she is competent to testify on the matters asserted within the verified complaint due to the authority of her position as a managing member of Allied Spectrum, LLC. As in *Charlotte-Mecklenburg Hosp. Authority*, the finder of fact may properly infer, by and from the nature of her position, that she was aware of the documents, business dealings, conversations, and transactions between Plaintiff and Defendants. This knowledge makes her competent to testify to those matters. *See Charlotte-Mecklenburg Hosp. Authority*, 366 N.C. at 49-50, 727 S.E.2d at 870-71. Ms. Amin has personal knowledge and is competent to testify to the allegations and statements made in the verified complaint and the exhibits incorporated and attached thereto. *See id.* Plaintiff's verified complaint was properly treated as an affidavit by the trial court.

III. Conclusion

"[A] plaintiff is vested with the authority to dismiss any of its claims prior to close of its case-in-chief." *Young*, 120 N.C. App. at 726, 464 S.E.2d at 83. Plaintiff properly filed its voluntary dismissal without prejudice prior to resting its case. The trial court was deprived of jurisdiction to enter the summary judgment order.

Presuming the trial court retained jurisdiction after Plaintiff filed its dismissal, Defendants' affidavits failed meet or carry their burden to show no genuine issues of material fact existed. The majority's conclusion that Plaintiff did not meet its burden on appeal to show genuine issues of material fact existed is erroneous.

I vote to reverse the trial court's order granting Defendants' motion for summary judgment on the alternative bases set forth herein, and remand to either dismiss pursuant to Plaintiff's voluntary dismissal, without prejudice, or to calendar Plaintiff's asserted claims for trial. I respectfully dissent.

BOLIER & CO., LLC v. DECCA FURNITURE (USA), INC.

[250 N.C. App. 323 (2016)]

BOLIER & COMPANY, LLC AND CHRISTIAN G. PLASMAN, PLAINTIFFS
v.
DECCA FURNITURE (USA), INC., DECCA CONTRACT FURNITURE, LLC, RICHARD HERBST, WAI THENG TIN, TSANG C. HUNG, DECCA FURNITURE, LTD., DECCA HOSPITALITY FURNISHINGS, LLC, DONGGUAN DECCA FURNITURE CO. LTD., DARREN HUDGINS AND DECCA HOME, DEFENDANTS
v.
CHRISTIAN J. PLASMAN A/K/A BARRETT PLASMAN, THIRD-PARTY DEFENDANT

No. COA15-1219

Filed 15 November 2016

Appeal and Error—interlocutory orders and appeals—preliminary injunction—failure to demonstrate substantial right

Plaintiffs' appeal from an interlocutory order by the trial court enforcing a preliminary injunction previously entered against them in this action was dismissed. Plaintiffs failed to satisfy their burden of demonstrating the loss of a substantial right absent immediate appeal of the order.

Appeal by plaintiffs and third-party defendant from order entered 26 May 2015 by Judge Louis A. Bledsoe, III in Catawba County Superior Court. Heard in the Court of Appeals 12 May 2016.

The Law Offices of Matthew K. Rogers, PLLC, by Matthew K. Rogers, for plaintiffs-appellants and third-party defendant-appellant.

McGuireWoods LLP, by Robert A. Muckenfuss, Jodie H. Lawson, and Andrew D. Atkins, for defendants-appellees.

DAVIS, Judge.

Bolier & Company, LLC ("Bolier"), Christian G. Plasman ("Plasman"), and Christian J. Plasman a/k/a Barrett Plasman ("Barrett") (collectively "Plaintiffs") appeal from an order by the trial court enforcing a preliminary injunction previously entered against them in this action. After careful review, we dismiss Plaintiffs' appeal.

Factual Background

Bolier is a closely held North Carolina company in the business of selling furniture. Bolier was originally founded and owned by Plasman. On 31 August 2003, Plasman entered into an operating agreement (the "Agreement") with Decca Furniture (USA), Inc. ("Decca USA"), which

is a wholly-owned subsidiary of Decca Contract Furniture, LLC ("Decca China").[1] Pursuant to the Agreement, Plasman conferred a 55% ownership interest in Bolier to Decca USA while retaining a 45% interest for himself. In return, Decca USA agreed to supply Bolier with furniture for retail sale.

According to Plasman, Richard Herbst, the president of Decca USA, and Tsang C. Hung, the chairman of Decca USA's board of directors, represented to him prior to the execution of the Agreement that while it was necessary for Decca to own a majority ownership interest in Bolier "on paper" due to certain rules of the Hong Kong Stock Exchange, Bolier would, in reality, be operated as a 50/50 partnership between Decca USA and Plasman. Following the execution of the Agreement, Plasman served as Bolier's president and chief executive officer while his son, Barrett, worked as Bolier's operations manager. However, this arrangement ended on 19 October 2012 when Herbst terminated the employment of both Plasman and Barrett because Bolier's revenues were no longer sufficient to support their annual salaries.

Although their employment had been terminated, Plasman and Barrett continued to work regularly out of Bolier's offices, ultimately causing Decca USA to change the locks to the company's offices. Plasman and Barrett also opened bank accounts in Bolier's name and diverted approximately $600,000.00 in customer payments intended for Bolier to those accounts. They proceeded to pay themselves at least $62,192.15 from those accounts as salaries, despite the fact that they were no longer employed by Bolier.

On 22 October 2012, Plaintiffs filed the present action (the "Lawsuit") in Catawba County Superior Court alleging claims for dissolution; breach of contract; fraud; constructive fraud; misappropriation of corporate opportunities; trademark, trade dress and copyright infringement; conspiracy to defraud; and unfair trade practices. On 24 October 2012, the Lawsuit was designated as a mandatory complex business case and assigned to the North Carolina Business Court. Decca removed the Lawsuit to the United States District Court for the Western District of North Carolina on 29 October 2012. On that same date, Decca filed a motion for a temporary restraining order and preliminary injunction against the Plasmans pursuant to Rule 65 of the Federal Rules of Civil Procedure seeking, among other things, to prohibit any additional

1. In this opinion, we refer at times to Decca USA and Decca China collectively as "Decca" and to Plasman and Barrett collectively as "the Plasmans."

diversion of Bolier funds and to recover the funds that had already been diverted.

A hearing on Decca's motion was held before the Honorable Richard L. Voorhees. On 27 February 2013, Judge Voorhees entered an order ("Judge Voorhees' Order") granting Decca's motion by entering a preliminary injunction that barred the Plasmans from taking any further actions on Bolier's behalf. Judge Voorhees' Order also directed them to return all diverted funds to Bolier within five business days and to provide an accounting of those funds to Decca USA. The order also put in place various mechanisms to safeguard Plasman's rights as a minority owner of Bolier during the pendency of the litigation.

Plaintiffs filed a document entitled "Plaintiffs' and Third Party Defendant's Response to Court Order" on 6 March 2013. In this document, they represented that they had "fully complied to the best of their ability with the Court Order signed on February 27, 2013." In addition, they stated that "Plaintiffs[']response herein is intended to comply with the spirit of the Court Order, and by complying herein, Plaintiffs are not waiving Plaintiffs' rights to request reconsideration or appeal."

On 13 March 2013, Plaintiffs filed a document captioned "Supplemental Motion for Preliminary Injunction Conditions and Plaintiff Safeguard Conditions" in which they requested that the federal court impose additional obligations on Decca to protect Plasman's status as a minority owner of Bolier — including the issuance of an injunction bond.

Plaintiffs never made any attempt to appeal Judge Voorhees' Order to the United States Court of Appeals for the Fourth Circuit. Nor did they file a motion for reconsideration of Judge Voorhees' Order.

On 19 September 2014, Judge Voorhees entered an order dismissing Plaintiffs' federal copyright claims and declining to exercise supplemental jurisdiction over Plaintiffs' state law claims. As a result, the Lawsuit was remanded to state court.

Upon remand, Plaintiffs filed in the Business Court a motion entitled "Plaintiffs' Motion to Amend Preliminary Injunction, to Dissolve Portions of the Preliminary Injunction and Award Damages, and Motion for Sanctions." In this document, Plaintiffs asked the court, *inter alia*, to amend various aspects of the preliminary injunction conditions set forth in Judge Voorhees' Order and to dissolve other portions of that order. In support of their motion, Plaintiffs asserted, in part, that

> since the Preliminary Injunction was entered, Plaintiff has obtained significant evidence supporting that [sic]

> (1) the Preliminary Injunction was improvidently granted, (2) incorrectly entered without protection of an injunction bond, as well as [sic] (3) the facts demonstrate changed circumstances warranting amendment of the Preliminary Injunction.

Plaintiffs then requested the entry of an order containing the following provisions:

> 1. Plasman and Barrett should be awarded at least $574,660.36 in damages relating to improper termination.
>
> 2. Decca USA should be required to pay [a] cash bond of at least $5,471,000.00 and up to $10,000,000.00 to reimburse Bolier relating to Decca's self-dealing, misappropriation of Bolier's corporate opportunities and other tortious conduct.
>
> 3. Decca USA should be required to pay for [an] independent third party audit and accounting of Bolier, Decca Home, Elan by Decca, Decca Contract Furniture, and Decca Hospitality Furnishings to account for all sales of Bolier designs, as well as sales of residential furniture by Decca Home and Elan by Decca.
>
> 4. Sanctions as contemplated by Plaintiffs' Motion for Contempt . . . to defer [sic] similar conduct in the future.

Decca USA filed a document in the Business Court entitled "Defendant Decca USA's Motion to Enforce Order, Motion for Contempt, and Motion for Sanctions." In this motion, Decca USA asserted that the Plasmans had willfully violated Judge Voorhees' Order and, as a result, sought enforcement of the preliminary injunction. Decca USA further requested that the Plasmans be held in contempt and that sanctions be imposed against them.

On 26 March 2015, a hearing on the parties' motions was held before the Honorable Louis A. Bledsoe, III. On 26 May 2015, Judge Bledsoe entered an order ("Judge Bledsoe's Order") denying Plaintiffs' motion and stating, in pertinent part, as follows:

> The federal court not only found that Chris Plasman had interfered with Bolier's business operations by diverting Bolier's funds to himself and others but that injunctive relief was necessary to ensure management control would be exercised by the Majority in Interest as provided

> under the Bolier Operating Agreement. The federal court crafted a thoughtful, well-reasoned, and narrowly-tailored [Preliminary Injunction] Order that placed managerial and operational control in Decca USA, the 55% owner, and imposed numerous safeguards to protect Chris Plasman's 45% minority interest in the company. This Court has not been persuaded, by either evidence or argument, that the federal court's carefully drafted [Preliminary Injunction] Order should be modified, amended, or dissolved in any respect.

With regard to Decca USA's motion, Judge Bledsoe declined to hold the Plasmans in contempt. However, he granted Decca USA's motion to enforce Judge Voorhees' Order and ordered that the Plasmans pay Decca USA $62,192.15 plus applicable interest and provide to Decca USA the accounting that had been required under Judge Voorhees' Order.[2]

Plaintiffs filed notice of appeal from Judge Bledsoe's Order on 25 June 2015. On 30 December 2015, Decca filed a motion to dismiss Plaintiffs' appeal.

Analysis

Decca has moved to dismiss Plaintiffs' appeal on the ground that it is an interlocutory appeal over which this Court lacks appellate jurisdiction. It is clear that this appeal is interlocutory. "A final judgment is one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court." *Duval v. OM Hospitality, LLC*, 186 N.C. App. 390, 392, 651 S.E.2d 261, 263 (2007) (citation omitted). Conversely, an order or judgment is interlocutory if it does not settle all of the issues in the case but rather "directs some further proceeding preliminary to the final decree." *Heavner v. Heavner*, 73 N.C. App. 331, 332, 326 S.E.2d 78, 80, *disc. review denied*, 313 N.C. 601, 330 S.E.2d 610 (1985).

Generally, there is no right of immediate appeal from an interlocutory order. *Paradigm Consultants, Ltd. v. Builders Mut. Ins. Co.*, 228 N.C. App. 314, 317, 745 S.E.2d 69, 72 (2013). The prohibition against interlocutory appeals "prevents fragmentary, premature and unnecessary appeals by permitting the trial court to bring the case to final judgment before it is presented to the appellate courts." *Russell v. State*

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2. Judge Bledsoe's Order also ruled on several other motions that had been made by the parties upon remand of the Lawsuit. However, none of Judge Bledsoe's rulings on those additional motions are directly relevant to the present appeal.

Farm Ins. Co., 136 N.C. App. 798, 800, 526 S.E.2d 494, 496 (2000) (citation and brackets omitted).

> However, there are two avenues by which a party may immediately appeal an interlocutory order or judgment. First, if the order or judgment is final as to some but not all of the claims or parties, and the trial court certifies the case for appeal pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(b), an immediate appeal will lie. Second, an appeal is permitted under N.C. Gen. Stat. §§ 1-277(a) and 7A-27(d)(1) if the trial court's decision deprives the appellant of a substantial right which would be lost absent immediate review.

N.C. Dep't of Transp. v. Page, 119 N.C. App. 730, 734, 460 S.E.2d 332, 334 (1995) (internal citations omitted).

Judge Bledsoe's Order does not contain a certification under Rule 54(b). Therefore, Plaintiffs' appeal is proper only if Plaintiffs can demonstrate a substantial right that would be lost absent an immediate appeal.

In order to analyze the question of whether this Court possesses jurisdiction over this appeal, we must closely examine not only Judge Bledsoe's Order but also Judge Voorhees' Order and Plaintiffs' filings in response thereto. Judge Voorhees' Order rejected Plasman's arguments regarding his right to equal control of Bolier but recognized the need for the imposition of safeguards to protect his rights as a minority shareholder. The federal court proceeded to enter a preliminary injunction stating, in pertinent part, as follows:

> The protections afforded by *Meiselman* and its progeny developed in light of the generally applicable principle of majority rule. Bound by agreement, statute, and doctrine, the majority in interest otherwise has the right to control corporate affairs. *See*, *e.g.*, *Gaines v. Long Mfg. Co.*, 67 S.E.2d 350, 354 (N.C. 1951) ("The majority has the right to control; but when it does so, it occupies a fiduciary relation toward the minority, as much so as the corporation itself or its officers and directors."); (*see also* Doc. 7-2 at 11) (providing that "all decisions or actions of the Company . . . or the Members shall require the approval, consent, agreement, or vote of the Majority in Interest").
>
> Here, the prior conduct of Plaintiff Plasman in continuing to manage and to control the operations of Bolier & Co.

has deprived the majority of this right. However, in light of Plaintiffs' claim that Defendants have engaged in self-serving transactions, the imposition of safeguards enabling Plaintiff Plasman to check the threat of self-dealing would be appropriate.

Defendants have proposed the following conditions, among others, to remain in effect pending the resolution of this case:

(1) Plaintiff Plasman is to be enjoined from holding himself out as President or CEO or Bolier & Co.;

(2) Third-Party Defendant Barrett Plasman is to have no further authority as an employee of Bolier & Co.;

(3) The Plasmans are to be prohibited from entering Decca USA or Bolier & Co. property without Decca USA's permission, and upon reasonable request, Decca USA shall grant such permission to Plaintiff Plasman in his role as minority member-manager;

(4) The Plasmans are to be enjoined from removing any property or fixtures from Bolier & Co.'s or Decca USA's premises without the written authorization or permission of Decca USA;

(5) The Plasmans are otherwise enjoined from interfering with Decca USA's or Bolier & Co.'s business operations;

(6) Within five business days of the entry of this Order, the Plasmans are to return to Decca USA's Bank of America lockbox all of Bolier & Co.'s monies, including but not limited to customer payments, diverted to them or to any bank account under their control, and such funds must be paid with a certified check;

(7) Within five business days of the entry of this Order, the Plasmans are required to provide an accounting to Decca USA, also to be filed with the Court, of all funds that were diverted from October 19, 2012, to the present, detailing who made the payments, when the payments were

received, the payment amounts, and the purpose of the payments;

(8) Decca USA shall provide Plaintiff Plasman with copies of Bolier & Co.'s financial statements on a monthly basis;

(9) At Plaintiff Plasman's request, all of Bolier & Co.'s books and records, including royalty and licensing payments, may be inspected and examined once every six months by an accountant of Plaintiff Plasman's choice at his expense at the Decca USA office or at a mutually agreeable location;

(10) Decca USA shall provide Plaintiff Plasman with copies of Bolier & Co.'s federal, state, and local income tax returns for each year beginning with 2012;

(11) Decca USA shall provide Plaintiff Plasman with any other information regarding Bolier & Co.'s affairs as is just and reasonable, or otherwise required by N.C. Gen. Stat. § 57C-3-04 or Bolier & Co.'s Operating Agreement;

(12) A member-manager meeting shall be held bi-annually, in April and October; in which Plaintiff Plasman may provide Bolier & Co. with his input regarding the company's management and affairs; and

(13) With regard to these member-manager meetings, Decca USA shall provide Plaintiff Plasman with at least ten days', and no more than fifty days', notice of the date, time, and place of such meetings.

The Court so orders.

Judge Voorhees' Order further provided that "[a]dditional conditions may be imposed upon subsequent motion of Plaintiff Plasman, to be filed with the Court within fourteen days of the date on which this Order is filed."

Seven days after Judge Voorhees' Order was entered, Plaintiffs filed a "Response to Court Order," which stated, in pertinent part, as follows:

"Plaintiffs[']s response herein is intended to comply with the spirit of the Court Order, and by complying herein, Plaintiffs are not waiving Plaintiffs' rights to request reconsideration or appeal." In this document, after expressing concerns with several provisions of Judge Voorhees' Order, Plaintiffs stated that "[a]s set forth herein, Plaintiffs have fully complied to the best of their ability with the Court Order signed on February 27, 2013."

Seven days later, Plaintiffs filed a "Supplemental Motion for Preliminary Injunction Conditions and Plaintiff Safeguard Conditions" in which they sought the entry of "an order establishing Preliminary Injunction conditions to safeguard Plaintiffs Chris Plasman and Bolier & Company, LLC pending final resolution of the merits." Plaintiffs listed eleven specific requests for such safeguards. In this document, Plaintiffs also requested that the federal court "clarify the . . . [Preliminary Injunction] Order to specifically permit [the Plasmans] to retain funds paid to Chris Plasman and Barrett Plasman for wages earned and Bolier . . . expenses paid (including the $12,000.00 paid as reimbursement for legal expenses) prior to January 14, 2013 shall [sic] not be paid to Decca USA pending final outcome of the litigation[.]"

The federal court never issued an order directly responding to Plaintiffs' motion. Instead, on 19 September 2014 the federal court dismissed Plaintiffs' federal claims and remanded the Lawsuit to state court.

In ruling on Decca's motion to enforce Judge Voorhees' Order, Judge Bledsoe stated the following in his 26 May 2015 order:

> [T]he evidentiary record before the federal court in entering the [Preliminary Injunction] Order included copies of each of eleven checks made payable to the Plasmans in the total amount of $62,192.15, and the federal court was advised that these checks were purportedly for payment of the Plasmans' wages, expenses, and attorney's fees incurred between their termination on October 19, 2012 and when they were finally locked out of Bolier on January 14, 2013. . . .
>
> {33} Based on these facts, the Court concludes that the federal court intended that the Funds at Issue paid from the Bolier accounts to the Plasmans to constitute funds covered by paragraph 6 of the [Preliminary Injunction] Order, and therefore, that the federal court ordered that these funds be returned to "Decca USA's Bank of America

> lockbox" within five days of the entry of the [Preliminary Injunction] Order. The Court further concludes that the federal court required the Plasmans, within the same five-day time period, to provide an accounting to Decca USA of "all funds that were diverted from October 19, 2012, to the present, detailing who made the payments, when the payments were received, the payment amounts, and the purpose of the payments," . . . and rejected any contentions by the Plasmans that they were unable to provide the requested information. As a result, the Court concludes that Defendant Decca USA's Motion to Enforce Order, for Contempt, and for Sanctions should be granted, in part, to require the Plasmans to pay to Decca USA the Funds at Issue in the amount of at least $62,192.15, plus interest at the legal rate from March 6, 2013, and to provide the accounting to Decca USA required under paragraph 7 of the [Preliminary Injunction] Order.

With regard to Plaintiffs' motion to dissolve and amend Judge Voorhees' Order, Judge Bledsoe ruled as follows:

> {43} Finally, although Plaintiffs argue that Decca USA has mismanaged the company since Chris Plasman was removed as President and CEO, the Court finds that Plaintiffs have failed to offer persuasive or compelling evidence to show that Plaintiffs will suffer irreparable harm if Chris Plasman is not returned to the chief management position at Bolier, that Defendants can no longer show a likelihood of success on the merits, or that equity otherwise demands that the [Preliminary Injunction] Order should be dissolved or amended at this time. To the contrary, the Court is persuaded that the continuation of the [Preliminary Injunction] Order — in particular, management by Decca USA, Bolier's Majority in Interest — will not cause Chris Plasman irreparable harm, is in the best interests of Bolier, and remains necessary to protect Bolier from irreparable harm. The federal court not only found that Chris Plasman had interfered with Bolier's business operations by diverting Bolier's funds to himself and others but that injunctive relief was necessary to ensure management control would be exercised by the Majority in Interest as provided under the Bolier Operating Agreement. The federal court crafted a thoughtful, well-reasoned, and narrowly-tailored

> [Preliminary Injunction] Order that placed managerial and operational control in Decca USA, the 55% owner, and imposed numerous safeguards to protect Chris Plasman's 45% minority interest in the company. This Court has not been persuaded, by either evidence or argument, that the federal court's carefully drafted [Preliminary Injunction] Order should be modified, amended, or dissolved in any respect.

(footnote omitted).

Having reviewed the relevant orders and filings by the parties, we conclude that Plaintiffs have failed to establish the existence of appellate jurisdiction over this appeal. Plaintiffs essentially make three arguments as to why appellate jurisdiction exists despite the significant passage of time since the federal preliminary injunction was entered. First, they contend that Judge Voorhees' Order was not immediately appealable because it did not contain a final preliminary injunction. Second, they argue that even if his order would otherwise have been appealable, the documents they filed in response to the order tolled their deadline for taking such an appeal. Third, they assert that even assuming they have lost the opportunity to appeal Judge Voorhees' Order, Judge Bledsoe's Order — which they *have* appealed — deprived them of a substantial right such that it was independently appealable. We address each of these arguments in turn.

First, we conclude that Judge Voorhees' Order was, in fact, appealable. It is well settled that preliminary injunction orders issued by a federal court are immediately appealable. *See Nationsbank Corp. v. Herman*, 174 F.3d 424, 427 (4th Cir.), *cert. denied*, 528 U.S. 1045, 145 L.Ed.2d 481 (1999).

While Plaintiffs do not dispute the appealability of federal preliminary injunctions as a general proposition, they contend that Judge Voorhees' Order was not yet final because it invited Plasman to move for additional safeguards to protect his interest as a minority owner of Bolier. We are unable to agree with this contention.

As shown above, the preliminary injunction contained in Judge Voorhees' Order addressed the basic issues as to which the parties disagreed, including the fundamental question of who was legally entitled to control Bolier. While the federal court granted the Plasmans leave to seek additional procedural safeguards if they so desired, this invitation did not render the preliminary injunction incomplete and, therefore, unappealable.

Second, Plaintiffs contend that their subsequent filings in federal court tolled their deadline for appealing Judge Voorhees' Order. We disagree.

Plaintiffs' "Response to Court Order" was not a motion to reconsider Judge Voorhees' Order. Indeed, they expressly stated therein that "Plaintiffs are not waiving Plaintiffs' rights to request reconsideration or appeal." They further represented in this document that they had "fully complied to the best of their abilities with [Judge Voorhees' Order]."

Nor was the filing of Plaintiffs' "Supplemental Motion for Preliminary Injunction Conditions and Plaintiff Safeguard Conditions" sufficient to toll their deadline for taking an appeal of Judge Voorhees' Order. The bulk of this document simply contained a request for the imposition of additional "reasonable condition[s] and protections" to safeguard Plasman's rights as a minority shareholder during the pendency of the litigation. The document did not purport to be a motion for reconsideration of Judge Voorhees Order, and we decline Plaintiffs' invitation to treat it as such. Had Plaintiffs intended to seek reconsideration of Judge Voorhees' Order so as to toll their deadline for appealing the preliminary injunction, they were required to file a motion that unambiguously sought such relief. However, they failed to do so. While Plaintiffs may have held out hope that the federal court would nevertheless modify its preliminary injunction as a result of their motion, it was still incumbent upon them to protect their appeal rights during the interim by taking an appeal of Judge Voorhees' Order to the Fourth Circuit within the thirty-day deadline provided by Rule 4 of the Federal Rules of Appellate Procedure. *See* Fed. R. App. P. 4(a)(1)(A).

Finally, we reject Plaintiffs' argument that Judge Bledsoe's Order was independently appealable. The specific aspects of Judge Bledsoe's Order cited by Plaintiffs as depriving them of a substantial right are essentially identical to the preliminary injunction terms contained in Judge Voorhees' Order, which Plaintiffs never appealed. Thus, because Judge Bledsoe's Order merely *enforces* the preliminary injunction entered by Judge Voorhees, our consideration of the substantive issues raised by Plaintiffs in the present appeal would enable them to achieve a "back door" appeal of Judge Voorhees' Order well over three years after its entry.

While Plaintiffs point in particular to the portion of Judge Bledsoe's Order directing them to pay to Decca USA $62,192.15 plus interest, they ignore the fact that Judge Bledsoe was simply enforcing the ruling in Judge Voorhees' Order ordering them to return to Decca USA all of the

funds that the Plasmans had diverted from Bolier.[3] Indeed, as referenced above, Judge Bledsoe's Order carefully explained how it arrived at the $62,192.15 figure, which was based on the total of eleven checks made payable to the Plasmans purporting to represent payments for their wages, expenses, and attorneys' fees incurred between the date of their termination on 19 October 2012 and the date "they were finally locked out of Bolier on January 14, 2013."

As Judge Bledsoe's Order noted, the record before the federal court at the time Judge Voorhees' Order was entered contained copies of these eleven checks. Therefore, rather than imposing a new directive requiring the payment of money by the Plasmans to Bolier, Judge Bledsoe's Order simply quantified the amount of money that the federal court had ordered Plaintiffs to pay Decca USA in light of the documents that the parties had put before the federal court *at the time the preliminary injunction was entered.*

Nor did Judge Bledsoe's Order make any substantive modifications to the issue of Bolier's management. Instead, Judge Bledsoe's Order merely reiterated the federal court's rulings on this subject.

> The federal court not only found that Chris Plasman had interfered with Bolier's business operations by diverting Bolier's funds to himself and others but that injunctive relief was necessary to ensure management control would be exercised by the Majority in Interest as provided under the Bolier Operating Agreement. The federal court crafted a thoughtful, well-reasoned, and narrowly-tailored [Preliminary Injunction] Order that placed managerial and operational control in Decca USA, the 55% owner, and imposed numerous safeguards to protect Chris Plasman's 45% minority interest in the company. *This Court has not been persuaded, by either evidence or argument, that the federal court's carefully drafted [Preliminary Injunction] Order should be modified, amended, or dissolved in any respect.*

(Emphasis added).

3. We note that while Judge Voorhees' Order directed Plaintiffs to return this money to Decca USA within five business days of the entry of the order, over three and a half years have elapsed, and Plaintiffs are still attempting to avoid this directive.

In sum, Judge Bledsoe's Order simply reiterates that Plaintiffs are bound to comply with the federal preliminary injunction that was entered on 27 February 2013. Therefore, because Plaintiffs have failed to satisfy their burden of demonstrating the loss of a substantial right absent immediate appeal of the order, their appeal must be dismissed. *See Robinson v. Gardner*, 167 N.C. App. 763, 769, 606 S.E.2d 449, 453 ("Defendants have not demonstrated the existence of any substantial right that would qualify them for immediate appeal. . . . We, therefore, allow plaintiffs' motions to dismiss the appeals."), *disc. review denied*, 359 N.C. 322, 611 S.E.2d 417, 418 (2005).[4]

Conclusion

For the reasons stated above, Plaintiffs' appeal is dismissed.

DISMISSED.

Judges DILLON and INMAN concur.

4. We also deny Plaintiffs' alternative request that we reach the merits of their appeal by treating the appeal as a petition for *certiorari*.

FLYNN v. SCHAMENS

[250 N.C. App. 337 (2016)]

KAREN W. FLYNN, INDIVIDUALLY AND IN HER REPRESENTATIVE CAPACITY AS TRUSTEE FOR: 2002 IRREVOCABLE TRUST FOR FAMILY OF MARTHA P. WILSON; AND HER CAPACITY AS ACCOUNT CUSTODIAN FOR: BRYNLEY ELIZABETH WYLDE, JAKE WILLIAM FLYNN, JEFFREY E. FLYNN III, JESSICA J. FLYNN, JOSHUA R. FLYNN, KEEGAN B. WALL, MAKENNA KATHLEEN WYLDE, AND RILEY PAGE WALL; PLAINTIFF

v.

DAVID WAYNE SCHAMENS; PILIANA MOSES SCHAMENS, INDIVIDUALLY AND IN HER CAPACITY AS A MEMBER OF INVICTUS ASSET MANAGEMENT, LLC; INVICTUS ASSET MANAGEMENT, LLC, INDIVIDUALLY AND IN ITS CAPACITY AS THE GENERAL PARTNER OF INVICTUS CAPITAL GROWTH & INCOME FUND, LLP, AND INVICTUS INCOME FUND, LLP; INVICTUS FUNDS, LLC; AND TRADEDESK FINANCIAL GROUP, INC. D/B/A TRADESTREAM ANALYTICS, LTD.; DEFENDANTS

No. COA16-410

Filed 15 November 2016

Arbitration—motion to confirm arbitration award—motion to vacate denied

The trial court erred by failing to confirm an arbitration award upon plaintiff's motion. After denying defendants' motion to vacate, the trial court was required to enter an order confirming the arbitration award and a judgment in conformity with the order.

Appeal by plaintiff from order entered 27 January 2016 by Judge Hugh B. Lewis in Mecklenburg County Superior Court. Heard in the Court of Appeals 5 October 2016.

Garella Law, P.C., by C. Kiel Garella, for plaintiff-appellant.

No brief filed for defendants-appellees.

ELMORE, Judge.

Plaintiff argues on appeal that the trial court erred in failing to confirm an arbitration award upon plaintiff's motion. We agree. The trial court's order is reversed and the case remanded for entry of (1) an order confirming the arbitration award and (2) a judgment in conformity therewith.

I. Background

Karen W. Flynn (plaintiff) sued David Shamens, Piliana Schamens, Invictus Asset Management, LLC, Invictus Capital Growth & Income Fund, LLP, Invictus Income Fund, LLP, and Tradedesk Financial Group,

Inc., (collectively, defendants) for alleged misconduct and misrepresentations related to investments made by plaintiff and the trust she managed into funds managed and controlled by defendants. The parties agreed to submit all claims to binding arbitration and stay court proceedings pending a resolution. In its decision and final award, the arbitrator found defendants jointly and severally liable to plaintiff for common law fraud, breach of fiduciary duty, and constructive fraud. Plaintiff was awarded damages totaling $2,107,090.79, plus interest.

Plaintiff subsequently moved for confirmation of the award and entry of judgment in Mecklenburg County Superior Court. Defendants, in turn, filed a motion to vacate the award. On 27 January 2016, the trial court entered an order denying defendants' motion to vacate and, without explanation, declaring "moot" plaintiff's motion to confirm. Plaintiff moved to correct the order but the court ultimately declined to hear the motion because notice of the hearing was not timely.

Plaintiff filed notice of appeal on 25 February 2016. On the hearing date, defendants moved to dismiss plaintiff's appeal, contesting jurisdiction based on improper service of the notice of appeal. After reviewing the record, we conclude that notice was properly given within the time and in the manner prescribed by our Rules of Appellate Procedure. We deny defendants' motion and address the merits of plaintiff's appeal.

II. Discussion

Plaintiff has the right to appeal the trial court's order pursuant to N.C. Gen. Stat. §§ 1-277(a) and 7A-27(b)(3) (2015) because the order "in effect determines the action, and prevents a judgment from which an appeal might be taken," or otherwise "discontinues the action." *See also* N.C. Gen. Stat. § 1-569.28(a)(3) (2015) ("An appeal may be taken from . . . [a]n order confirming or denying confirmation of an award.").

On appeal, plaintiff argues that the trial court was required to confirm the arbitration award following the denial of defendants' motion to vacate. When reviewing a trial court's decision to confirm or vacate an arbitration award, "we accept findings of fact that are not 'clearly erroneous' and review conclusions of law *de novo*." *Carpenter v. Brooks*, 139 N.C. App. 745, 750, 534 S.E.2d 641, 645 (2000) (citing *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 947–48, 131 L. Ed. 2d 985, 996 (1995)); *see also First Union Secs., Inc. v. Lorelli*, 168 N.C. App. 398, 400, 607 S.E.2d 674, 676 (2005).

Upon a party's motion, a trial court must issue an order confirming an arbitration award unless the award is modified, corrected, or vacated.

N.C. Gen. Stat. §§ 1-569.22, .23(d), .24(b) (2015). If and when the trial court issues an order confirming, modifying, or vacating an arbitration award, it must also "enter a judgment in conformity with the order." N.C. Gen. Stat. § 1-569.25(a) (2015). Case law interpreting the prior versions of these statutes has reached the same conclusion. *See*, *e.g.*, *Carteret Cnty. v. United Contractors of Kinston, Inc.*, 120 N.C. App. 336, 346, 462 S.E.2d 816, 823 (1995) ("[T]he court must confirm the award unless one of the statutory grounds for vacating or modifying the award exists." (citation omitted)); *FCR Greensboro, Inc. v. C & M Invs. of High Point, Inc.*, 119 N.C. App. 575, 577, 459 S.E.2d 292, 294 (1995) ("[T]he trial court must confirm the award unless grounds exist to either vacate or modify the award." (citation omitted)). And although the statutes were repealed and replaced by Session Law 2003-345, their substance has not changed. *Compare* N.C. Gen. Stat. § 1-569.22 (2015) ("Upon motion of a party for an order confirming the award, the court shall issue a confirming order unless the award is modified or corrected . . . or is vacated . . . ."), *with* N.C. Gen. Stat. § 1-567.12 (2001) ("Upon application of a party, the court shall confirm an award, unless . . . grounds are urged for vacating or modifying or correcting the award . . . ."); N.C. Gen. Stat. § 1-569.23(d) (2015) ("If the court denies a motion to vacate an award, it shall confirm the award unless a motion to modify or correct the award . . . is pending."), *with* N.C. Gen. Stat. § 1-567.13(d) (2001) ("If the application to vacate is denied and no motion to modify or correct the award is pending, the court shall confirm the award."); N.C. Gen. Stat. § 1-569.24(b) (2015) ("If a motion [to modify or correct the award] is granted, the court shall modify and confirm the award as modified or corrected. Otherwise, unless a motion to vacate is pending, the court shall confirm the award."), *with* N.C. Gen. Stat. § 1-567.14(b) (2001) ("If the application [to modify or correct the award] is granted, the court shall modify and correct the award so as to effect its intent and shall confirm the award as so modified and corrected. Otherwise, the court shall confirm the award as made.").

In this case, plaintiff filed a motion to confirm the arbitration award. Defendants in turn filed a motion to vacate, which was denied by the trial court. Defendants did not move to modify or correct the award, and there were no such motions pending before the court when it entered its order. If the court had granted defendants' motion to vacate, then plaintiff's motion to confirm would have been moot—but not *vice versa*. *See In re Arbitration Between State and Davidson & Jones Constr. Co.*, 72 N.C. App. 149, 152–53, 323 S.E.2d 466, 469 (1984). Upon denying defendants' motion to vacate, therefore, the trial court was required to enter

an order confirming the arbitration award and a judgment in conformity with the order.

III. Conclusion

We reverse the trial court's order and remand for entry of (1) an order confirming the arbitration award and (2) a judgment in conformity therewith.

REVERSED AND REMANDED.

Judges HUNTER, JR. and DILLON concur.

FLORENCE BAILEY HINTON, Plaintiff
v.
WILLIE GEORGE HINTON II, Defendant

No. COA16-85

Filed 15 November 2016

Parties—motion to intervene—remand for reconsideration

The Court of Appeals vacated the portion of the trial court's 17 November 2015 order denying movants' motion to intervene and remanded this matter to the trial court for reconsideration of the motion under Rule 24.

Appeal by movants from order entered 17 November 2015 by Judge Darrell B. Cayton, Jr. in Martin County District Court. Heard in the Court of Appeals 8 June 2016.

The Jones Law Group, PLLC, by Jacinta D. Jones and Maria E. Bruner, for plaintiff-appellee.

Trimpi & Nash LLP, by John G. Trimpi, for movants-appellants.

DAVIS, Judge.

This appeal arises from a divorce judgment that incorrectly listed the name of the couple's son instead of the name of the husband. Because of this error, the divorce judgment was set aside fifteen years later. Bryon A. Long, Nyesha H. Riddick, and Darvin A. Felton (collectively "Movants")

— who are all children of the husband — subsequently sought to intervene in the proceedings and have the order setting aside the divorce judgment vacated. Movants appeal from the trial court's 17 November 2015 order denying their motion to intervene. After careful review, we vacate the order in part and remand for further proceedings.

Factual Background

Florence Bailey Hinton ("Mrs. Hinton") and Willie George Hinton, Sr. ("Mr. Hinton") were married in August 1974, and two children were born of the marriage: Raronzee J. Hinton and Willie George Hinton, II ("Willie"). The couple separated in August 1998, and Mrs. Hinton filed a complaint for divorce in Martin County District Court on 12 April 2000. In the caption of the complaint and on the accompanying summons, the name of the defendant was incorrectly listed as "Willie George Hinton, II." In the body of the complaint, Mrs. Hinton alleged that "Plaintiff and Defendant were married" and requested "that the bonds of matrimony heretofore existing between the parties be dissolved and the Plaintiff be granted an absolute divorce from the Defendant."

On 18 April 2000, Mr. Hinton received a copy of the summons and complaint, and on 25 April 2000, he filed an answer to the complaint. In the caption to his answer, Mr. Hinton listed his correct name: "Willie George Hinton, Sr." His answer admitted all of the allegations contained in Mrs. Hinton's complaint. The court issued a divorce judgment (the "Divorce Judgment") on 12 May 2000 that contained the incorrect name "Winton George Hinton, II"[1] as the defendant.

Mr. Hinton died intestate on 17 May 2015 after spending three weeks in the hospital. Although he never remarried, Mr. Hinton fathered three children outside of his marriage to Mrs. Hinton — Bryon A. Long, Nyesha H. Riddick, and Darvin A. Felton, who are the movants in this action. On 6 May 2015, prior to Mr. Hinton's death but after he entered the hospital, Mrs. Hinton filed a motion (1) to set aside the Divorce Judgment pursuant to Rule 60(b)(4) of the North Carolina Rules of Civil Procedure, asserting that it was void on its face due to impossibility in that it purported to have granted her a divorce from her *son* rather than from her husband; and (2) in the alternative, to correct the defendant's name on the Divorce Judgment pursuant to Rule 60(b)(1). On 29 May 2015, after Mr. Hinton's death, Mrs. Hinton amended her motion to delete the

1. While it is not clear from the record why the name "Winton" — rather than "Willie" — appeared on the Divorce Judgment, the listing of the defendant's first name as "Winton" does not form the basis for any of the issues presented in this appeal.

request to correct the error, leaving only the motion to set aside the Divorce Judgment.

On 4 June 2015, a hearing was held before the Honorable Darrell B. Cayton, Jr. to determine whether the Divorce Judgment should be set aside. On 9 June 2015, the trial court entered an order, stating as follows:

> 1. The parties had proper notice of this hearing and are properly before this Court.
>
> 2. [Mrs. Hinton] through her former counsel intended to file an absolute divorce action from her husband, Willie George Hinton, Sr., however a Civil Summons and Complaint for Absolute Divorce was ultimately filed and served upon Defendant Willie George Hinton II. This Court entered a divorce judgment based upon one year's separation from Willie George Hinton II on May 12, 2000.
>
> 2. [sic] [Mrs. Hinton's] lawful husband, Willie George Hinton, Sr., filed an answer in this action. Willie George Hinton, Sr., was not at the time of filing and has never been made a proper party to this action.
>
> 3. Defendant Willie George Hinton II was not married to [Mrs. Hinton] but rather is the (now adult) child of [Mrs. Hinton] and Willie George Hinton, Sr., born of the marriage between [Mrs. Hinton] and Willie George Hinton, Sr.
>
> 4. Neither [Mrs. Hinton] nor Willie George Hinton, Sr., who died after the filing of this Motion but prior to its hearing, remarried following the entry of the prior divorce judgment.
>
> 5. The prior judgment entered on May 12, 2000, obtains an absolute divorce judgment from Willie George Hinton II, a person to whom [Mrs. Hinton] was never married. Accordingly, the prior absolute divorce judgment of this Court is void due to impossibility.

Based on these findings, the trial court granted Mrs. Hinton's motion and set aside the Divorce Judgment.

On 15 June 2015, Movants filed a motion to intervene, a motion to substitute parties or to abate or continue, a motion to alter or amend judgment, and a motion for a new trial. In support of these motions, Movants filed affidavits in which they asserted, *inter alia*, that (1) they had initially learned at their father's wake that Mrs. Hinton was seeking

to correct the defendant's name on the Divorce Judgment; (2) they later discovered that Mrs. Hinton was instead trying to set aside the Divorce Judgment; and (3) upon realizing her true intentions, Movants retained counsel to prevent Mrs. Hinton from obtaining this relief.

In their motion to intervene, Movants stated, in pertinent part, as follows:

> 4. The aforesaid children of Willie G. Hinton have an interest as tenants in common in the real property owned by their father at his death and have a claim as heirs to his assets after the payment of claims of the estate and creditors. Plaintiff's claim would undermine their ownership interests in the event that she had the right to claim a spouse's allowance or an intestate share or qualify as administratrix.

On 28 August 2015, a hearing on Movants' motions was held before Judge Cayton. On 17 November 2015, the court entered an order containing the following findings of fact:

> 1. The parties and movants had proper notice of this hearing and are properly before this Court.
>
> 2. In this action . . . [Mrs. Hinton] through her former counsel intended to file an absolute divorce action from her husband, Willie George Hinton, Sr., however a Civil Summons was issued in the name of Defendant Willie George Hinton II and a Complaint for Absolute Divorce was filed and validly served upon Defendant Willie George Hinton II.
>
> 3. The summons and complaint were served upon Defendant Willie George Hinton II, the only defendant in this action. Service of process was accomplished by Sheriff's service by delivering said process to Robert Hinton at 906 Raleigh Street, Elizabeth City, North Carolina. Movants, through their various affidavits, verify that Robert Hinton was over the age of eighteen (18) years at that time, and that he and Willie George Hinton II resided at that address.
>
> 4. Defendant Willie George Hinton II was not married to [Mrs. Hinton] but rather is the (now adult) child of [Mrs.

Hinton] and Willie George Hinton, Sr., born of the marriage between [Mrs. Hinton] and Willie George Hinton, Sr.

5. [Mrs. Hinton's] lawful husband, Willie George Hinton, Sr., filed an answer in this action, admitting the allegations in [Mrs. Hinton's] complaint, including that [Mrs. Hinton] was married to Willie George Hinton II.

6. This Court entered a divorce judgment based upon one year's separation from Willie George Hinton II May 12, 2000.

7. On May 29, 2015, [Mrs. Hinton] filed an Amended Motion to Set Aside the prior judgment entered on May 12, 2000, following the death of Willie George Hinton, Sr.

8. On June 4, 2015, the Court held a hearing upon [Mrs. Hinton's] motion. The Defendant, Willie George Hinton, II, was properly served and present for said hearing. Finding that an absolute divorce judgment from Willie George Hinton II, a person to whom [Mrs. Hinton] was never married, is void *ab initio* due to impossibility, this Court entered an order on June 9, 2015, setting aside the May 12, 2000 divorce judgment after reviewing the record, considering the arguments of counsel and receiving no objection from the Defendant Willie George Hinton II.

9. No summons or amended summons was issued in the name of Willie George Hinton, Sr. or served upon Willie George Hinton, Sr., extending the Court's jurisdiction over Willie George Hinton, Sr., personally. Nothing in the record establishes any defect in service as to Willie George Hinton, Sr[.]

10. No amendment of [Mrs. Hinton's] complaint, or issue of fact raised in the answer filed by Willie George Hinton, Sr., established that [Mrs. Hinton] was married to Willie George Hinton, Sr., rather than Defendant Willie George Hinton, II. Nothing provided the Court with subject matter jurisdiction over the marriage between [Mrs. Hinton] and Willie George Hinton, Sr.

11. While the names of Willie George Hinton II and Willie George Hinton, Sr., are similar, Defendant Willie George Hinton II and Willie George Hinton, Sr., are distinct and

> separate individuals. Nothing in the record establishes that the summons or [Mrs. Hinton's] complaint contains a misnomer or misdescription as to the identity of the party intended to be sued.
>
> 12. Willie George Hinton, Sr., is not, and has never been, a party to this action entitled to notice and an opportunity to be heard.
>
> 13. Amending the identity of the Defendant from the named Defendant Willie George Hinton II to Willie George Hinton, Sr., amounts to an improper substitution or entire change of parties.
>
> 14. Movants, who are the heirs of Willie George Hinton, Sr., have no interest in this action as their ancestor, Willie George Hinton, Sr. is not, and has never been, a party to this action.

Based on these findings of fact, the trial court made the following pertinent conclusions of law:

> 3. Willie George Hinton, Sr., has never been a party to this action.
>
> 4. No substitution of a party to represent the interests of Willie George Hinton, Sr., in this action following his death is necessary or proper.
>
> 5. No alteration, amendment or modification of the prior order entered on June 9, 2015 to correct the name of the Defendant is necessary or proper.
>
> 6. No new trial is necessary or proper in that Willie George Hinton, Sr., nor his heirs or anyone purporting to represent his interests, are parties entitled to notice and an opportunity to be heard.
>
> 7. This Court's prior order, entered on June 9, 2015 upon the Court's own review of the record and consideration of the arguments of counsel, without objection from either the Plaintiff or the Defendant, was properly entered and is affirmed.

Based on these conclusions of law, the trial court ordered the following:

1. The Motion to Intervene, Motion to Alter or Amend Judgment, Motion for New Trial, and Motion to Substitute Parties or to Abate or Continue are denied.

2. The prior order of this Court entered June 9, 2015 is affirmed in that the divorce judgment entered May 12, 2000 is set aside.

On 11 December 2015, Movants filed a written notice of appeal.

Analysis

Movants seek review from this Court over the trial court's 9 June and 17 November 2015 orders in their entirety. However, because Movants are not currently parties to this action, the only issue they are entitled to raise in the present appeal is whether the trial court erred in the portion of its 17 November 2015 order denying their motion to intervene.

Motions to intervene are governed by Rule 24 of the North Carolina Rules of Civil Procedure, which states, in pertinent part, as follows:

(a) **Intervention of right.** — Upon timely application anyone shall be permitted to intervene in an action:

(1) When a statute confers an unconditional right to intervene; or

(2) When the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(b) **Permissive intervention.** — Upon timely application anyone may be permitted to intervene in an action.

(1) When a statute confers a conditional right to intervene; or

(2) When an applicant's claim or defense and the main action have a question of law or fact in common. . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

N.C. Gen. Stat. § 1A-1, Rule 24 (2015).

Movants assert that the trial court erred in failing to grant their motion to intervene pursuant to Rule 24(a)(2). "[A] party is entitled to intervene pursuant to N.C. Gen. Stat. § 1A-1, Rule 24(a)(2) in the event that he or she can demonstrate (1) an interest relating to the property or transaction, (2) practical impairment of the protection of that interest, and (3) inadequate representation of the interest by existing parties." *Bailey & Assocs., Inc. v. Wilmington Bd. of Adjust.*, 202 N.C. App. 177, 185, 689 S.E.2d 576, 583 (2010). "This Court reviews a trial court's decision granting or denying a motion to intervene pursuant to N.C. Gen. Stat. § 1A-1, Rule 24(a)(2), on a *de novo* basis." *Id.*

The sole finding in the trial court's 17 November 2015 order expressly addressing Movants is finding No. 14, which states: "Movants, who are the heirs of Willie George Hinton, Sr., have no interest in this action as their ancestor, Willie George Hinton, Sr. is not, and has never been, a party to this action." Finding No. 12 reiterates the trial court's conclusion that "Willie George Hinton, Sr., is not, and has never been, a party to this action entitled to notice and an opportunity to be heard."

When a "finding includes a mixed question of fact and law . . . [it is] fully reviewable by this Court." *Olivetti Corp. v. Ames Bus. Sys., Inc.*, 319 N.C. 534, 548, 356 S.E.2d 578, 586-87 (1987) (citation omitted). As explained below, we conclude that the above-quoted findings are fatally flawed because they are premised on an erroneous legal determination regarding Mr. Hinton's status as a party.

While Mrs. Hinton's complaint for divorce incorrectly listed Willie — as opposed to Mr. Hinton — as the defendant, Mr. Hinton filed an answer to the complaint thirteen days after the complaint was filed. His handwritten answer stated as follows:

> State of North Carolina File No. 00CVD 177
>
> Martin County
>
> Name of Defendant:
> Willie George Hinton, Sr.
> Address:
> 906 Raleigh St.
> City State Zip Code
> Elizabeth City, N.C. 27909
>
> To Each of The Plaintiff(s) Named Below:
>
> Florence Bailey Hinton
> 906 Hunter St.
> Elizabeth City, N.C. 27909

> Defendant answers complaint of Plaintiff says [sic]:
>
> That Defendan[t] admits to all of the complaints from 1 Thru [sic] 5 are true.
>
> Wherefore, the defendant answers the Plaintiff's prayers that the bonds of Matrimony heretofore existing between the parties be dissolved and the defendant be granted an absolute divorce from the Plaintiff.
>
> This the 20th day of April 2000.
>
> Willie George Hinton
> Defendant

By filing this answer, Mr. Hinton expressly became a party to the action and submitted himself to the jurisdiction of the court. *See* N.C. Gen. Stat § 1-75.7 (when a party "makes a general appearance in an action[,]" the court has personal jurisdiction over him).

Accordingly, we vacate the portion of the trial court's 17 November 2015 order denying Movants' motion to intervene and remand this matter to the trial court for reconsideration of the motion under Rule 24. *See Anderson v. Seascape at Holden Plantation, LLC*, 232 N.C. App. 3, 10, 753 S.E.2d 691, 698 (2014) ("Therefore, we reverse the trial court's order denying the POA's motion to intervene and remand for further proceedings.")

Conclusion

For the reasons stated above, we vacate the portion of the trial court's 17 November 2015 order denying Movants' motion to intervene and remand for further proceedings not inconsistent with this opinion.

VACATED IN PART AND REMANDED.

Judges ELMORE and Judge DIETZ concur.

HIRSCHMAN v. CHATHAM CTY.

[250 N.C. App. 349 (2016)]

DANIEL HIRSCHMAN, JASON & JOAN HICKEY, WILLIAM HLAVAC, CHRISTOPHER & AMY GAMBER, JAMES MILLER, JEFFREY C. PUGH AND JANICE M. RIVERO, PETITIONERS
v.
CHATHAM COUNTY, RESPONDENT

No. COA16-292

Filed 15 November 2016

Jurisdiction—conditional use permit—outsider appeal—petition for writ of certiorari—failure to include applicant as respondent

The trial court did not err by concluding that it lacked jurisdiction based on petitioners' failure to properly perfect their appeal under N.C.G.S. § 160A-393. When an applicant is granted a conditional use permit and an outsider appeals the decision through a petition for writ of certiorari but does not include the applicant as a respondent in the appeal, the superior court is without jurisdiction to review the merits.

Appeal by petitioners from Order entered 29 October 2015 by Judge Paul C. Ridgeway in Chatham County Superior Court. Heard in the Court of Appeals 21 September 2016.

The Brough Law Firm, PLLC, by G. Nicholas Herman, for petitioners.

Poyner Spruill, LLP, by Richard J. Rose, for respondent Chatham County.

Smith Moore Leatherwood, LLP, by Karen M. Kemerait and M. Gray Styers, Jr., for respondents New Cingular Wireless PCS, LLC and American Tower, LLC.

ELMORE, Judge.

Daniel Hirschman, Jason and Joan Hickey, William Hlavac, Christopher and Amy Gamber, James Miller, and Jeffrey C. Pugh and Janice M. Rivero (petitioners) appeal from the Chatham County Superior Court's order dismissing with prejudice their petition for writ of certiorari. After careful review, we affirm.

I. Background

According to the petition, on 30 April 2014, American Tower, LLC and AT&T Mobility (the applicant) applied to Chatham County (respondent) for a conditional- use permit to erect and operate a monopole telecommunications tower. The Chatham County Board of Commissioners (BOC) held a quasi-judicial hearing on the matter on 16 June 2014, and it forwarded the application to the county planning board for a recommendation. On 5 August 2014, the county planning board recommended that the conditional-use permit be approved. The BOC held a meeting on 15 September 2014 in which it granted the conditional-use permit by adopting a resolution. The BOC's decision was filed with the clerk of the BOC on 6 October 2014.

Petitioners are citizens and residents of Chatham County who live "within plain view" of the proposed tower. On 31 October 2014, petitioners filed a "Petition for Review in the Nature of Certiorari," seeking review of the BOC's decision to grant the applicant a conditional-use permit. Petitioners alleged that they had standing to bring the petition because they were "owners of residences and lots in close proximity to the tower site such that the tower will be plainly visible from [p]etitioners' properties," and they "will sustain a diminution in the fair market values of their properties and an impairment of the residential integrity and character of their community."

On 10 November 2014, the Chatham County Superior Court issued a writ of certiorari. Respondent filed a response to the petition and a motion to dismiss, arguing that the petition was deficient in that petitioners failed to name the applicant as a respondent as required by N.C. Gen. Stat. § 160A-393(e). Thus, respondent claimed that the superior court lacked jurisdiction. Second, respondent argued that petitioners lacked standing because there was no evidence to establish that they would suffer special damages. On 30 April 2015, petitioners filed a "motion for entry of consent order allowing motion to intervene, or, in the alternative, for an order to include the applicant and other parties designated in the consent order [to] be added as respondents."

After a hearing on respondent's motion, the trial court entered an order concluding that it lacked subject matter jurisdiction over the cause "because the appeal was not properly perfected in accordance with N.C. Gen. Stat. § 160[A]-393(e) in that the [p]etitioners were not the applicants before the decision-making board whose decision is being appealed, and the [p]etitioners failed to name the applicants, AT&T and American Towers, as respondents in their petition." Accordingly, the

trial court granted respondent's motion to dismiss and dismissed the petition with prejudice. Petitioners appeal.

II. Analysis

"The appellate court reviews *de novo* an order of the trial court allowing a motion to dismiss for lack of subject matter jurisdiction[.]" *Cooke v. Faulkner*, 137 N.C. App. 755, 757, 529 S.E.2d 512, 513 (2000) (citation omitted).

Petitioners argue that their failure to name the applicant as a respondent in the petition did not deprive the trial court of subject matter jurisdiction, relying exclusively on our holding in *MYC Klepper/Brandon Knolls L.L.C. v. Board of Adjustment for City of Asheville*, 238 N.C. App. 432, 436–37, 767 S.E.2d 668, 671 (2014). Respondent claims that the trial court correctly dismissed the petition because petitioners failed to comply with N.C. Gen. Stat. § 160A-393(e), which constituted a jurisdictional defect. Alternatively, pursuant to Rule 10(c)[1] of the North Carolina Rules of Appellate Procedure, respondent argues that the petition must be dismissed because petitioners lack standing.

> When deciding special use permits or conditional use permits, the board of county commissioners or planning board shall follow quasi-judicial procedures. . . . Every such decision of the board of county commissioners or planning board shall be subject to review of the superior court in the nature of certiorari consistent with G.S. 160A-388.

N.C. Gen. Stat. § 153A-340(c1) (2015). Section 160A-388(e2)(2) provides: "Every quasi-judicial decision shall be subject to review by the superior court by proceedings in the nature of certiorari pursuant to G.S. 160A-393." N.C. Gen. Stat. § 160A-388(e2)(2) (2015). Furthermore, "[a] petition for review shall be filed with the clerk of superior court by the later of 30 days after the decision is effective or after a written copy thereof is given in accordance with subdivision (1) of this subsection." *Id.*

N.C. Gen. Stat. § 160A-393, entitled "Appeals in the nature of certiorari," applies to "appeals of quasi-judicial decisions of decision-making

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1. N.C. R. App. P. 10(c) (2016) provides:

> 1. Without taking an appeal, an appellee may list proposed issues on appeal in the record on appeal based on any action or omission of the trial court that was properly preserved for appellate review and that deprived the appellee of an alternative basis in law for supporting the judgment, order, or other determination from which appeal has been taken.

boards when that appeal is to superior court and in the nature of certiorari as required by this Article." N.C. Gen. Stat. § 160A-393(a) (2015); *see also* 2009 N.C. Sess. Law 2009-421 ("An act to clarify the law regarding appeals of quasi-judicial decisions made under Article 19 of Chapter 160A and Article 18 of Chapter 153A of the General Statutes."). "An appeal in the nature of certiorari shall be initiated by filing with the superior court a petition for writ of certiorari." N.C. Gen. Stat. § 160A-393(c). Relevant here, subsection (e), entitled "Respondent" provides:

> The respondent named in the petition shall be the city whose decision-making board made the decision that is being appealed, except that if the petitioner is a city that has filed a petition pursuant to subdivision (4) of subsection (d) of this section, then the respondent shall be the decision-making board. *If the petitioner is not the applicant before the decision-making board whose decision is being appealed, the petitioner shall also name that applicant as a respondent. . . .*

N.C. Gen. Stat. § 160A-393(e) (emphasis added). "Our appellate courts have consistently held that the use of the word 'shall' in a statute indicates what actions are required or mandatory." *Morningstar Marinas/Eaton Ferry, LLC v. Warren Cnty.*, 233 N.C. App. 23, 28, 755 S.E.2d 75, 79, *disc. review denied*, 367 N.C. 508, 758 S.E.2d 862 (2014), and *aff'd*, 368 N.C. 360, 777 S.E.2d 733 (2015).

Here, respondent directs our attention to two unpublished opinions that have addressed this precise issue. In *Whitson v. Camden County Board of Commissioners*, COA12-1282, 2013 WL 3770664, at *1 (N.C. Ct. App. July 16, 2013), the Camden County Board of Commissioners approved Camden Plantation Properties, Inc.'s application for a conditional-use permit. Mr. Whitson, a nearby landowner, filed a petition for writ of certiorari, seeking review of the board's decision. *Id.* Pursuant to the county's motion, the superior court dismissed the petition because Mr. Whitson failed to name the applicant as a respondent in his petition, as required by statute. *Id.* On appeal, this Court observed that "[a]s the trial court concluded, '[N.C. Gen. Stat.] § 160A-393(e) is jurisdictional in nature.' " *Id.* at *2. Citing the "clear and unambiguous" language in N.C. Gen. Stat. § 160A-393(e), we concluded that the trial court properly dismissed the petition. *Id.*

In *Philadelphus Presbyterian Foundation, Inc. v. Robeson County Board of Adjustment*, COA13-777, 2014 WL 47325, at *1 (N.C. Ct. App. Jan. 7, 2014), *disc. review denied*, 367 N.C. 504, 758 S.E.2d 873 (2014),

this Court similarly affirmed a trial court's order for the same reason. The Robeson County Board of Commissioners approved Buie Lakes Plantation, LLC's application for a conditional-use permit. *Id.* The petitioners, a number of individuals and two corporations, filed a petition for writ of certiorari, seeking review of the board's decision. *Id.* The petitioners did not name the applicant, Buie Lakes, as a respondent. *Id.* The named respondents moved to dismiss the petition, which the superior court allowed because the petitioners failed to name the applicant as a respondent in the petition, as required by statute. *Id.* at *2.

On appeal, this Court acknowledged that *Whitson* was not binding, but we concluded that

> it is consistent with and compelled by our decision in *McCrann v. Village of Pinehurst*, 216 N.C. App. 291, 716 S.E.2d 667 (2011), in which the petitioner's challenge to the issuance of a conditional use permit was not filed within the thirty day period specified in N.C. Gen. Stat. § 160A-388(e2) and in which we held that this deficiency, like the failure to note an appeal in a timely manner, deprived the reviewing court of any jurisdiction to hear and determine the issues raised in the petition. . . .
>
> Although the filing of a *certiorari* petition certainly bears some resemblance to the institution of a civil action, as Petitioners implicitly assert, the analogy between an appeal and a request for *certiorari* review made in *McCrann* is clearly the correct one. In such *certiorari* proceedings, the "superior court is not a trier of fact, but assumes the posture of an appellate court." *In re Appeal of Willis*, 129 N.C. App. 499, 500, 500 S.E.2d 723, 725 (1998). . . . For that reason, we conclude that the extent to which a trial court obtains jurisdiction to address the issues raised in a *certiorari* petition should be analyzed in the same manner as the extent to which an appellate court obtains jurisdiction over an appeal from the General Court of Justice or an administrative agency.

Philadelphus Presbyterian Found., Inc., 2014 WL 47325, at *3.

The *Philadelphus* Court also addressed the petitioners' argument that, based on our decision in *Mize v. Mecklenburg County*, 80 N.C. App. 279, 341 S.E.2d 767 (1986), the trial court was obligated to allow their motion to amend the petition. *Philadelphus Presbyterian Found.*,

Inc., 2014 WL 47325, at *5. In *Mize*, the trial court dismissed the petitioners' "Petition in the Nature of Certiorari," filed under N.C. Gen. Stat. § 153A-345, for failing to join a necessary party. *Mize*, 80 N.C. App. at 280–81, 341 S.E.2d at 768. This Court reversed, noting that a dismissal "under Rule 12(b)(7) is proper only when the defect cannot be cured" and "under the circumstances presented, the court abused its discretion by failing to allow the petitioners to amend the petition to join the Zoning Board of Adjustment." *Id.* at 283–84, 341 S.E.2d at 769–70. The *Philadelphus* Court stated that the petitioners' reliance on *Mize* was misplaced because the *Mize* Court specifically noted the following:

> The language of [N.C. Gen. Stat. §] 153A-345 requires only that any petition seeking review by the superior court be filed with the clerk of superior court within 30 days after the decision of the Board is filed or after a written copy has been delivered to every aggrieved party. *The petitioners complied with all the express requirements of this vague statute* by filing a petition in Mecklenburg County Superior Court within 30 days of the decision of the Board.

Philadelphus Presbyterian Found., Inc., 2014 WL 47325, at *5 (quoting *Mize*, 80 N.C. App. at 283, 341 S.E.2d at 769) (emphasis added).

The *Philadelphus* Court stated that "although the *Mize* petitioners failed to join a necessary party, they did comply with all of the statutorily prescribed prerequisites for the filing of a valid *certiorari* petition." *Id.*; *see Mize*, 80 N.C. App. at 281, 341 S.E.2d at 768 ("The statute[, N.C. Gen. Stat. § 153A-345,] does not set forth who is to be named as a respondent or defendant in a proceeding under its provisions."). In contrast, the *Philadelphus* petitioners "failed to comply with the additional statutory requirements for a valid certiorari petition spelled out in N.C. Gen. Stat. § 160A-393, a statutory section which was enacted over two decades after the issuance of our decision in *Mize*." *Philadelphus Presbyterian Found., Inc.*, 2014 WL 47325, at *5. Accordingly, we stated: "[G]iven that the petitioners' failure to join a necessary party in *Mize* did not, unlike the failure to join a necessary party at issue here, constitute a jurisdictional defect, *Mize* provides no basis for an award of the relief which Petitioners seek in this case." *Id.*

Nonetheless, here petitioners argue that our holding in *MYC Klepper*, 238 N.C. App. at 436–37, 767 S.E.2d at 671, is "dispositive of the question presented by the instant appeal[.]" In *MYC Klepper*, the petitioner, a billboard sign owner, filed a petition for writ of certiorari, seeking

review of the City of Asheville Board of Adjustment's decision to uphold a notice of violation regarding a billboard sign it owned. *Id.* at 433–35, 767 S.E.2d at 669–71. The petitioner named the "Board of Adjustment for the City of Asheville," not the "City of Asheville," as required by N.C. Gen. Stat. § 160A-393(e) ("The respondent named in the petition shall be the city whose decision-making board made the decision that is being appealed[.]"). *Id.* at 436, 767 S.E.2d at 671. On appeal, this Court stated that the "defect" amounted to a failure to join a necessary party, "the City was on notice of this action and participated in the defense thereof[,]" and "the City's participation in the proceedings cured the defect in the petition[.]" *Id.* at 436–37, 767 S.E.2d at 671.

The facts of *MYC Klepper* are distinguishable from the current facts. In that case, the issue involved a notice of violation, not the granting of a conditional-use permit, and the petitioner was the billboard sign owner, not an interested neighbor. *Id.* at 433–35, 767 S.E.2d at 669–71. The *MYC Klepper* Court's holding did not address the statutory requirement that the applicant be named as a respondent when the petitioner is not the applicant. *See* N.C. Gen. Stat. § 160A-393(e).

We note that in *Darnell v. Town of Franklin*, 131 N.C. App. 846, 849–50, 508 S.E.2d 841, 844 (1998), a case decided before the enactment of N.C. Gen. Stat. § 160A-393, this Court held that the petitioner should have been allowed to amend her petition for writ of certiorari under Rule 15 in order to establish her status as an aggrieved party and to show that jurisdiction exists. The Court stated that "a pleading may not be amended so as to confer jurisdiction in a particular case stated; but there may be an amendment to show that the jurisdiction exists." *Id.* at 850, 508 S.E.2d at 844 (citations omitted). We also note, though, that in *Crossman v. Moore*, 341 N.C. 185, 187, 459 S.E.2d 715, 717 (1995), our Supreme Court interpreted Rule 15 and stated that it "speaks of claims and allows the relation back of claims if the original claim gives notice of the transactions or occurrences to be proved pursuant to the amended pleading. When the amendment seeks to add a party-defendant or substitute a party-defendant to the suit, the required notice cannot occur." Thus, the Court held that Rule 15 "is not authority for the relation back of a claim against a new party." *Id.* Since then, this Court "has construed the *Crossman* decision to mean that Rule 15(c) is not authority for the relation back of claims against a new party, but *may* allow for the relation back of an amendment to correct a mere misnomer." *Piland v. Hertford Cnty. Bd. of Comm'rs*, 141 N.C. App. 293, 299, 539 S.E.2d 669, 673 (2000).

While *Whitson* and *Philadelphus Presbyterian Foundation, Inc.* are unpublished and, therefore, not binding[2], we find their analyses persuasive and directly applicable here. *See Henderson v. Cnty. of Onslow*, ___ N.C. App. ___, ___, 782 S.E.2d 57, 60 (Feb. 2, 2016) (COA Nos. 14-1355 and 14-1356) (relying on and quoting *Philadelphus Presbyterian Foundation, Inc.*, 2014 WL 47325, at *6, for the proposition that "*certiorari* proceedings conducted pursuant to N.C. Gen. Stat. § 160A-393 . . . bear a much greater resemblance to appellate proceedings than to ordinary civil actions"). Recently, the *Henderson* Court stated:

> A petition for certiorari is not an action for civil redress or relief as is a suit for damages or divorce; a petition for certiorari is simply a request for the court addressed to judicially review a particular decision of some inferior tribunal or government body. . . . [A] petition for certiorari is not the beginning of an action for relief . . . .; in effect it is an appeal from a decision made by another body or tribunal. Certiorari was devised by the early common law courts as a substitute for appeal and it has been so employed in our jurisprudence since the earliest times.

Henderson, ___ N.C. App. at ___, 782 S.E.2d at 61 (quoting *Little v. City of Locust*, 83 N.C. App. 224, 226–27, 349 S.E.2d 627, 629 (1986)).

According to well-established law, "an appeal is not a matter of absolute right, but the appellant must comply with the statutes and rules of Court as to the time and manner of taking and perfecting his appeal." *Caudle v. Morris*, 158 N.C. 594, 595, 74 S.E. 98, 98 (1912); *see also In re Halifax Paper Co.*, 259 N.C. 589, 592, 131 S.E.2d 441, 444 (1963) ("There is no inherent or inalienable right of appeal from an inferior court to a superior court or from a superior court to the Supreme Court."); *Northfield Dev. Co. v. City of Burlington*, 165 N.C. App. 885, 887, 599 S.E.2d 921, 924 (2004) ("[A]venues of appeal are created by statute."). Moreover, "[c]ompliance with the requirements for entry of notice of appeal is jurisdictional." *State v. Oates*, 366 N.C. 264, 266, 732 S.E.2d 571, 573 (2012) (citing *Dogwood Dev. & Mgmt. Co. v. White Oak Transp. Co.*, 362 N.C. 191, 197–98, 657 S.E.2d 361, 364–65 (2008)) ("The appellant's compliance with the jurisdictional rules governing the taking of an appeal is the linchpin that connects the appellate division with the trial division and confers upon the appellate court the authority to act in a

2. N.C. R. App. P. 30(e)(3) (2016) ("An unpublished decision of the North Carolina Court of Appeals does not constitute controlling legal authority.").

particular case."). Therefore, "a default precluding appellate review on the merits necessarily arises when the appealing party fails to complete all of the steps necessary to vest jurisdiction in the appellate court." *Dogwood Dev. & Mgmt. Co.*, 362 N.C. at 197, 657 S.E.2d at 364.

Here, petitioners were not the applicant before the decision-making board whose decision was appealed. Therefore, under N.C. Gen. Stat. § 160A-393(e), petitioners were required to name the applicant as a respondent, which they failed to do. As this Court has previously stated, "[t]he real adverse party in interest is the party in whose favor the Zoning Board's decision has been made." *Mize*, 80 N.C. App. at 282–83, 341 S.E.2d at 769 (noting that the zoning board was a necessary party because "the Board [was] the agency having custody of the record that [was] being reviewed"). In order to avoid the dilemmas our courts have previously faced in attempting to ascertain the required respondents in an appeal of a quasi-judicial decision, *see*, *e.g*, *id.* at 281, 341 S.E.2d at 768 ("First we address whether the Zoning Board of Adjustment is a necessary party to a petition filed pursuant to G.S. 153A-345(e)."), our General Assembly specifically listed the required respondents in N.C. Gen. Stat. § 160A-393(e). Thus, when an applicant is granted a conditional-use permit and an outsider appeals the decision through a petition for writ of certiorari but does not include the applicant as a respondent in the appeal, the superior court is without jurisdiction to review the merits. Accordingly, the trial court correctly concluded that it lacked jurisdiction because petitioners did not properly perfect their appeal in accordance with N.C. Gen. Stat. § 160A-393. We do not reach respondent's alternative argument on standing.

III. Conclusion

The trial court did not err in dismissing the petition. We affirm.

AFFIRMED.

Judges ZACHARY and ENOCHS concur.

IN RE GARRETT

[250 N.C. App. 358 (2016)]

IN RE FORECLOSURE OF REAL PROPERTY UNDER DEED OF TRUST FROM IAN MAURICE GARRETT AND SUSAN GARRETT AKA SUSAN G. GARRETT, IN THE ORIGINAL AMOUNT OF $163,542.00, PAYABLE TO HOUSEHOLD REALTY CORPORATION, DATED NOVEMBER 30, 2000 AND RECORDED ON DECEMBER 7, 2000 IN BOOK 11774 AT PAGE 677, MECKLENBURG COUNTY REGISTRY

Nos. COA15-1083, 15-1118

Filed 15 November 2016

1. Service of Process—New York address—same address on deed—used on prior occasions

The trial court did not err by denying petitioner Household's motion to set aside the HOA Foreclosure under Rule 60(b)(4) based on alleged improper service. Given the use of the New York address on the deed and to serve Household on other occasions, service on Household in the HOA Foreclosure was not improper. Further, the Court of Appeals was not persuaded by either of Household's arguments against application of N.C.G.S. § 47F-3-116.1.

2. Deeds—foreclosure—substitute trustee—motion to set aside—improper notice

The trial court did not err in granting STS' motion to set aside and vacate the Household Foreclosure and substitute trustee's deed. STS was the owner of the property and was not noticed in the Household Foreclosure.

3. Attorney Fees—vacated order—new hearing

The Court of Appeals vacated the Fees Order and remanded the attorney fees issue to the trial court for a new hearing.

Appeal by petitioner from order filed 4 April 2015 by Judge William R. Bell in Mecklenburg County Superior Court and from order filed 15 June 2015 by Judge Forrest D. Bridges in Mecklenburg County Superior Court. Consolidated appeals heard in the Court of Appeals 29 March 2016.

Katten Muchin Rosenman LLP, by Rebecca K. Lindahl, for appellant Household Realty Corporation.

Sellers, Ayers, Dortch & Lyons, P.A., by Robert C. Dortch, Jr., for appellee Wedgewood North Homeowners Association, Inc.

The Garis Law Firm, by Jeffrey I. Garis, for appellee Select Transportation Services LLC.

McCULLOUGH, Judge.

Household Realty Corporation ("Household") appeals from order denying its motion to set aside the foreclosure in file number 13-SP-272 and granting Select Transportation Services LLC's ("STS") motion to set aside the foreclosure in file number 13 SP 3311. Household also appeals from a separate order awarding STS attorney's fees. For the following reasons, we affirm in part and vacate and remand in part.

I. Background

As evidence of a debt owed by Ian and Susan Garrett (the "Garretts") to Household, on 30 November 2000, the Garretts executed a note in favor of Household secured by a deed of trust for property located at 8506 Piccone Brook Lane in Charlotte, North Carolina (the "property"), a single family residence in a community subject to the North Carolina Planned Community Act (the "PCA"), N.C. Gen. Stat. § 47F-1-101 *et seq.* The deed of trust was recorded in the Mecklenburg County Register of Deeds on 7 December 2000.

Due to the Garretts' default in the payment of assessments and other charges levied by Wedgewood North Homeowners Association, Inc. ("HOA"), on 29 June 2010, HOA filed and recorded a "Claim of Lien" on the property. HOA then initiated foreclosure proceedings, during which HOA's agent, JMA Holdings, LLC ("JMA"), purchased the property at public auction on 19 October 2010 for $2,486.25. An "Association Lien Foreclosure Deed" conveying the property to JMA was made on 11 November 2010 and recorded on 23 December 2010. By a non-warranty deed recorded on 27 July 2011, JMA conveyed the property to HOA. Upon the payment of the past due assessments, HOA later conveyed the property to Household by non-warranty deed recorded on 29 September 2011. The non-warranty deed conveying the property to Household designated Household as the grantee as follows:

Household Realty Corporation
c/o HSBC Bank USA
2929 Walden Avenue
Erie, NY 14043

Due to Household's default in the payment of assessments and other charges levied by HOA, on 3 January 2013, HOA filed and recorded a "Claim of Lien" on the property and initiated foreclosure proceedings in file number 13 SP 272 (the "HOA Foreclosure"). "Notice of Hearing Prior to Foreclosure of Claim of Lien" in the HOA Foreclosure was filed on

9 January 2013. Following a hearing on 22 February 2013, the Assistant Clerk of Superior Court issued an "Order Permitting Foreclosure of Claim of Lien" in the HOA Foreclosure. The property was purchased at public auction by Universal Funding, Inc. ("Universal"), for $2,400.00 on 28 March 2013. An "Association Lien Foreclosure Deed" conveying the property to Universal was made on 12 April 2013 and recorded on 31 May 2013. By non-warranty deed made on 3 June 2013 and recorded on 12 June 2013, Universal conveyed the property to STS. Final affidavits and reports regarding the HOA Foreclosure were filed on 6 June 2013.

However, before Universal conveyed the property to STS, Household initiated separate foreclosure proceedings in file number 13 SP 3311 on the deed of trust executed by the Garretts (the "Household Foreclosure"). A "Notice of Hearing" in the Household Foreclosure was filed on 8 May 2013 and an "Amended Notice of Hearing" was filed on 31 May 2013. Following a hearing, on 21 August 2013, the Assistant Clerk of Superior Court issued an "Order to Allow Foreclosure Sale" in the Household Foreclosure. STS was never provided notice of the hearing. Trustee Services of Carolina, LLC, conducted a sale of the property at public auction on 18 September 2013 in the Household Foreclosure. Household was the highest bidder, purchasing the property for $160,421.18. A notice of appeal of the order of foreclosure in the Household Foreclosure was filed 20 September 2013 and bond on appeal was set at $2,000.00. The bond was posted that same day and the Household Foreclosure was stayed pending resolution of the appeal. It is unclear who appealed the order of foreclosure because the signature on the notice of appeal is illegible. However, in a motion to dismiss the appeal as untimely filed by Household on 8 October 2013, Household indicates the Garretts filed the appeal. Household's motion to dismiss the appeal came on for hearing and was granted on 12 November 2013. By "Substitute Trustee's Deed" made on 5 March 2014 and recorded on 7 March 2014, Household was conveyed title to the property. Final affidavits and reports regarding the Household Foreclosure were filed on 7 March 2014.

Months later, on 20 October 2014, STS filed a Rule 60(b) motion to set aside and vacate the Household Foreclosure and the substitute trustee's deed conveying the property to Household. STS asserted the doctrine of merger and lack of proper notice as grounds to set aside the Household Foreclosure. STS also requested attorney's fees in its motion.

On 16 December 2014, Household filed its own Rule 60(b) motion to set aside the HOA Foreclosure, a response to STS's motion to set aside and vacate the Household Foreclosure and substitute trustee's deed, and a motion to consolidate the Rule 60(b) motions for hearing. In

their response to STS's motion, Household claimed it first learned of the HOA Foreclosure when it was served with STS's motion to set aside the Household Foreclosure.

The motions came on for hearing in Mecklenburg County Superior Court before the Honorable William R. Bell on 28 January 2015. On 4 April 2015, the trial court entered an order granting STS's motion to set aside and vacate the Household Foreclosure and substitute trustee's deed in file number 13 SP 3311 and denying Household's motion to set aside the HOA Foreclosure in file number 13 SP 272 (the "Rule 60(b) Order"). The order left the issue of reasonable legal expenses and attorney's fees to be determined at a later hearing. Household filed notice of appeal from the Rule 60(b) Order on 1 May 2015.

Notice of a hearing on STS's motion for attorney's fees was filed 26 March 2015, and the matter came on for hearing as scheduled in Mecklenburg County Superior Court before the Honorable Forrest D. Bridges on 18 April 2015. On 15 June 2015, the trial court entered an order awarding STS attorney's fees pursuant to N.C. Gen. Stat. § 6-21.5 and N.C. Gen. Stat. § 1A-1, Rule 11(a) (the "Fees Order"). Household filed notice of appeal from the Fees Order on 2 July 2015.

Household's appeals from the Rule 60(b) Order and the Fees Order were consolidated for appeal by order of this Court on 1 March 2016.

II. Discussion

Household's appeal from the Rule 60(b) order in COA15-1083 concerns the trial court's ruling on Rule 60(b) motions for relief from judgment or order pursuant to subsections (3), (4), and (6) of that rule. Those subsections of Rule 60(b) provide for relief from judgment or order as follows:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:
>
> . . . .
>
> (3) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;
>
> (4) The judgment is void;
>
> . . . .

> (6) Any other reason justifying relief from the operation of the judgment.

N.C. Gen. Stat. § 1A-1, Rule 60(b) (2015). "[A] motion for relief under Rule 60(b) is addressed to the sound discretion of the trial court and appellate review is limited to determining whether the court abused its discretion." *Sink v. Easter*, 288 N.C. 183, 198, 217 S.E.2d 532, 541 (1975). "A judge is subject to reversal for abuse of discretion only upon a showing by a litigant that the challenged actions are manifestly unsupported by reason." *Clark v. Clark*, 301 N.C. 123, 129, 271 S.E.2d 58, 63 (1980).

Household challenges both the denial of its motion to set aside the HOA Foreclosure and the grant of STS's motion to set aside and vacate the Household Foreclosure and substitute trustee's deed.

Household's appeal from the Fees Order in COA15-1118 concerns the trial court's award of fees to STS. We address the Fees Order after the Rule 60(b) Order.

Denial of Household's Motion to Set Aside the HOA Foreclosure

[1] We first address the trial court's denial of Household's motion to set aside the HOA Foreclosure. Household contends the trial court erred in denying its motion to set aside the HOA Foreclosure under Rule 60(b)(4) because the HOA Foreclosure is void for lack of proper service. *See Van Engen v. Que Scientific, Inc.*, 151 N.C. App. 683, 689, 567 S.E.2d 179, 184 (2002) ("A judgment or order rendered without an essential element such as jurisdiction or proper service of process is void." (alterations omitted)).

Under the PCA, "[an] association . . . may foreclose a claim of lien in like manner as a mortgage or deed of trust on real estate under power of sale, as provided in Article 2A of Chapter 45 of the General Statutes, if the assessment remains unpaid for 90 days or more." N.C. Gen. Stat. § 47F-3-116(f) (2015). Article 21 of Chapter 45 of the General Statutes provides, in pertinent part, as follows:

> After the notice of hearing is filed, the notice of hearing shall be served upon each party entitled to notice under this section. The notice shall specify a time and place for the hearing before the clerk of court and shall be served not less than 10 days prior to the date of such hearing. The notice shall be served and proof of service shall be made in any manner provided by the Rules of Civil Procedure for service of summons, including service by registered mail or certified mail, return receipt requested. . . .

N.C. Gen. Stat. § 45-21.16(a) (2015). Under the Rules of Civil Procedure, service upon a domestic or foreign corporation may be accomplished by the following:

> a. By delivering a copy of the summons and of the complaint to an officer, director, or managing agent of the corporation or by leaving copies thereof in the office of such officer, director, or managing agent with the person who is apparently in charge of the office.
>
> b. By delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to be served or to accept service of process or by serving process upon such agent or the party in a manner specified by any statute.
>
> c. By mailing a copy of the summons and of the complaint, registered or certified mail, return receipt requested, addressed to the officer, director or agent to be served as specified in paragraphs a and b.
>
> d. By depositing with a designated delivery service authorized pursuant to 26 U.S.C. § 7502(f)(2) a copy of the summons and complaint, addressed to the officer, director, or agent to be served as specified in paragraphs a. and b., delivering to the addressee, and obtaining a delivery receipt. As used in this sub-subdivision, "delivery receipt" includes an electronic or facsimile receipt.

N.C. Gen. Stat. § 1A-1, Rule 4(j)(6) (2015).

In the HOA Foreclosure, the "Notice of Hearing Prior To Foreclosure of Claim of Lien" filed on 9 January 2013 indicated it was to Household "by serving its Officer, Director, or Managing Agent" at both the property, "8506 Piccone Brook Lane, Charlotte, NC 28216," and "c/o HSBC Bank USA, 2929 Walden Avenue, Erie, NY 14043." On 22 February 2013, counsel for HOA filed an affidavit showing attempted service on Household at the two addresses indicated on the notice. HOA's counsel further indicated in the affidavit that reasonable attempts to ascertain Household's current address were made and the addresses used were believed to be the last known addresses for Household. Return receipts attached to the affidavit showed that the notice mailed to the property was returned marked "vacant" and the notice mailed to the New York address was received on 12 January 2013. Following a hearing on 22 February 2013, the Assistant Clerk of Superior Court issued an "Order

Permitting Foreclosure of Claim of Lien" in the HOA Foreclosure. In that foreclosure order, the Assistant Clerk found that "[n]otice of this [h]earing has been served on the record owners of real estate and to all persons against whom the [HOA] intends to assert liability for the debt as required [by] Chapter 45 of the North Carolina General Statutes and Rule 4 of the North Carolina Rules of Civil Procedure."

Thereafter, upon review of Household's Rule 60(b) motion and arguments, the trial court found as follows regarding service in the HOA Foreclosure:

> 9. Notice of the [HOA Foreclosure] resulting in the deed to Universal was mailed to Household as follows:
>
> Household Realty Corporation
> by serving its Officer, Director, or Managing Agent
> c/o HSBC Bank USA
> 2929 Walden Avenue
> Erie, NY 14043
>
> 10. At the time of the [HOA Foreclosure], Household maintained a registered agent for service of process in North Carolina and a principal office in Mettawa, Illinois.

Household recognizes the trial court's findings regarding service and does not dispute those findings, but instead contends the trial court erred in failing to issue a conclusion that service was proper. Household further contends service was not proper under Rule 4(j)(6) and, therefore, the HOA Foreclosure is void. Household specifically asserts that the New York address to which service was made was HSBC Bank USA's records department and not the office of a Household officer, director, or managing agent. Household also points out that it had a registered agent in North Carolina at the time of the HOA Foreclosure.

While Household may have had a registered agent in North Carolina that could have been served, that does not mean service was not proper to an officer, director, or managing agent, c/o HSBC Bank USA, to the New York address. The affidavit filed by HOA's counsel describes the attempts made to locate Household. Ultimately, HOA's counsel settled on service at the address of the property and the New York address. Upon review of the record, it is not clear that service to the New York address was not proper service upon an "officer, director, or managing agent" given that HOA was instructed to send the deed conveying the property to Household to the New York address and the New York address was used to provide notice to Household on other occasions.

Household acknowledges that it once asked HOA to send a copy of a recorded deed to the New York address; but Household contends that request did not empower HOA to serve process to the New York address. In support of its argument, Household cites *Fulton v. Mickle*, 134 N.C. App. 620, 518 S.E.2d 518 (1999), for the proposition that service upon a claims examiner with whom the plaintiff had communicated about the case was not proper service on the insurance company under Rule 4(j)(6). The present case, however, is easily distinguishable from *Fulton*. In *Fulton*, this Court held that the service was defective in two respects: "First, the process was not sent certified or registered mail, return receipt requested, and second, the process was not addressed to an officer, director, or agent authorized to receive service of process." *Id.* at 624, 518 S.E.2d at 521. Unlike in *Fulton*, service in the present case was by certified mail, return receipt requested, and addressed to "Household Realty Corporation by serving its Officer, Director, or Managing Agent." The return receipt was signed as received on 12 January 2013. Thus, the decisive factors in *Fulton* are not present in this case. Moreover, besides the acknowledged communications directing the deed to be sent to the New York address, the deed recorded on 29 September 2011 conveying the property from HOA to Household designated Household as the grantee with the New York address as follows:

Household Realty Corporation
c/o HSBC Bank USA
2929 Walden Avenue
Erie, NY 14043.

This is also the same New York address where the substitute trustee in the Household Foreclosure served Household, as indicated in the substitute trustee's affidavit of service. The return receipts in both the HOA Foreclosure and the Household Foreclosure appear to be signed as received by the same individual at the New York address.

Given the use of the New York address on the deed and to serve Household on other occasions, service on Household in the HOA Foreclosure was not improper. Thus, the trial court did not err in denying Household's motion to set aside the HOA Foreclosure.

Additionally, we note that it appears Household's motion is barred by a PCA provision validating certain foreclosure proceedings. That provision provides as follows:

> [A]ll nonjudicial foreclosure proceedings commenced by an association before October 1, 2013, and all sales and transfers of real property as part of those proceedings

> pursuant to the provisions of this Chapter or provisions contained in the declaration of the planned community, are declared to be valid, unless an action to set aside the foreclosure is commenced on or before October 1, 2013, or within one year after the date of the sale, whichever occurs last.

N.C. Gen. Stat. § 47F-3-116.1 (2015).

In the HOA Foreclosure, HOA filed and recorded a claim of lien on 3 January 2013 and then filed notice of foreclosure on 9 January 2013. The property was sold at public auction on 28 March 2013 and the deed conveying the property to Universal was made 12 April 2013 and recorded 31 May 2013. Final affidavits and reports concerning the HOA Foreclosure were filed 6 June 2013. Household did not file its motion to set aside the HOA Foreclosure until 16 December 2014.

The language of the statute is unambiguous and serves to validate the HOA Foreclosure "one year after the date of sale." As a result, Household's motion to set aside the HOA Foreclosure was untimely.

Household expressly acknowledges that more than one year elapsed between the HOA Foreclosure and the filing of its motion to set aside. Household, however, contends that the legislative history of the statute indicates the statute was not intended to bar a motion to set aside a foreclosure sale for lack of notice. Household also relies on *Howell v. Treece*, 70 N.C. App. 322, 319 S.E.2d 301 (1984), in which we held the one-year statute of limitations on motions to reopen or set aside judgments in tax foreclosure actions did not bar the plaintiff's subsequent action where the plaintiff did not receive notice of the foreclosure because a lapse of time could not satisfy the demands of due process. *Id.* at 326-27, 319 S.E.2d 303-304. Having already determined notice was proper, we are not persuaded by either of Household's arguments against application of N.C. Gen. Stat. § 47F-3-116.1. The trial court did not err in denying Household's motion to set aside the HOA Foreclosure.

Grant of STS's Motion to Set Aside the Household Foreclosure

[2] We next address the trial court's grant of STS's motion to set aside and vacate the Household Foreclosure and substitute trustee's deed. Household contends "STS's motion was granted under Rule 60(b)(6) because of the doctrine of merger[]" and, therefore, STS cannot argue service was improper in the Household Foreclosure. Household then asserts the trial court's denial of STS's motion based on the doctrine of merger is erroneous because STS did not have standing to challenge the

Household Foreclosure and the doctrine of merger is inapplicable in the present case. Household's arguments, in part, are based on its overruled assertion that the HOA Foreclosure is void.

While the trial court did address merger in its conclusions, noting that "merger extinguished Household's right to foreclose against any future owner of the [p]roperty[,]" it does not appear that that was the sole basis of the trial court's grant of STS's motion. In the order the trial court issued the following findings:

> 14. Universal acquired the Property by an Association Lien Foreclosure Deed which was recorded with the Mecklenburg County Registry on May 31, 2013.
>
> 15. STS acquired the Property from Universal through a Non-Warranty Deed which was recorded with the Mecklenburg County Registry on June 3, 2013.
>
> 16. Household failed to notice either of the subsequent owners, Universal or STS regarding the Foreclosure proceeding that they had filed on August 21, 2013 (the "Household Foreclosure").

The trial court then issued the following conclusions:

> 3. The [m]ovant, STS, had standing to file its motion on the grounds that it was the current owner of the [p]roperty at the time of the Household Foreclosure and is still the current owner.
>
> . . . .
>
> 5. As the Garretts were not the record owners of the [p]roperty at the time of the Household Foreclosure, the Household Foreclosure was invalid and void and therefore, should be set aside and vacated.

Based on these findings and conclusions, we overrule Household's argument that the trial court erred in granting STS's motion to set aside and vacate the Household Foreclosure and substitute trustee's deed and we do not address the merger portion of the trial court's order. Having upheld the trial court's denial of Household's motion to set aside the HOA Foreclosure, STS was the owner of the property and was not noticed in the Household Foreclosure. Therefore, the above conclusions of the trial court are correct and the trial court did not err in granting STS' motion to set aside and vacate the Household Foreclosure and substitute trustee's deed.

The trial court's 4 April 2015 order denying Household's motion and granting STS's motion is affirmed.

Attorney's Fees

[3] Concerning the trial court's award of attorney's fees to STS, Household contends the trial court erred in awarding fees because there was not proper notice of the bases for fees and because there was not a complete absence of justiciable issues. Our review of the matter is based solely on the record before this Court.

The record shows that STS first asserted its request for attorney's fees in its Rule 60(b) motion to set aside and vacate the Household Foreclosure and substitute trustee's deed. In the motion, STS simply requested in its prayer for relief that it "be granted all reasonable legal expenses and attorney's fees from 'Household[.]' " As indicated above, the trial court reserved the issue of attorney's fees for a subsequent hearing when it issued the Rule 60(b) Order. Thereafter, STS gave notice of a hearing that provided only that "the Presiding Judge will hear the claim of relief of the Plaintiff as set forth in the Motion, a copy of which has been served upon you along with this Notice of Hearing." Following a hearing on 28 April 2015, the trial court entered an order awarding attorney's fees pursuant to N.C. Gen. Stat. § 6-21.5 and N.C. Gen. Stat. § 1A-1, Rule 11(a).

Household now argues STS failed to assert the bases of the request for attorney's fees in advance of the hearing as required by N.C. Gen. Stat. § 1A-1, Rule 7(b)(1), which provides as follows:

> An application to the court for an order shall be by motion which, unless made during a hearing or trial or at a session at which a cause is on the calendar for that session, shall be made in writing, *shall state with particularity the grounds therefor*, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.

N.C. Gen. Stat. § 1A-1, Rule 7(b)(1) (2015) (emphasis added). Household contends STS never narrowed the possible bases for its request for attorney's fees and, therefore, it was not prepared to defend an assertion of Rule 11 sanctions. Furthermore, Household contends STS never requested attorney's fees pursuant to N.C. Gen. Stat. § 6-21.5, which provides in pertinent part as follows:

> In any civil action, special proceeding, or estate or trust proceeding, the court, upon motion of the prevailing party,

> may award a reasonable attorney's fee to the prevailing party if the court finds that there was a complete absence of a justiciable issue of either law or fact raised by the losing party in any pleading.

N.C. Gen. Stat. § 6-21.5 (2015).

In response to Household's arguments, STS contends the bases of its fee's request was made known during the hearing on attorney's fees.

Without addressing the merits of STS's arguments, we vacate the Fees Order and remand the attorney's fees issue to the trial court for a new hearing. The record before this Court, which is devoid of the 28 April 2015 hearing transcript, is unclear when and which bases for attorney's fees were asserted by STS. Additionally, the Fees Order is not entirely clear. The trial court found that "STS raised four statutory bases for an award of attorneys' fees in the instant motion[.]" Yet, there is no such motion in the record before this Court. Furthermore, in the same finding citing "four statutory bases," the trial court lists only three bases. Those bases listed do not include N.C. Gen. Stat. § 6-21.5, one of the bases on which the trial court ultimately determined fees should be awarded. Where the record is not clear, we will not surmise what happened below or what the trial court intended in its order.

III. Conclusion

For the reasons discussed we affirm the trial court's denial of Household's Rule 60(b) motion and affirm the grant of STS's Rule 60(b) motion. We vacate the Fees Order and remand for a new hearing.

AFFIRMED IN PART, VACATED AND REMANDED IN PART.

Judges BRYANT and STEPHENS concur.

IN RE J.S.

[250 N.C. App. 370 (2016)]

IN THE MATTER OF J.S., D.S., AND B.S.

No. COA16-582

Filed 15 November 2016

Child Abuse, Dependency, and Neglect—child neglect—permanency planning order—jurisdiction—mootness

Respondent mother's challenge in a child neglect case to a permanency planning order on the basis of its failure to comply with N.C.G.S. § 7B-1000 lacked merit. Further, the trial court's entry of both an order ending the jurisdiction of juvenile court and of a civil custody order rendered moot the merits of a permanency planning order.

Appeal by respondent-mother from order entered 8 April 2016 by Judge Monica M. Bousman in Wake County District Court. Heard in the Court of Appeals 20 October 2016.

Ellis & Winters, LLP, by Lenor Marquis Segal, for Guardian ad Litem-appellee.

Leslie Rawls for respondent-appellant.

ZACHARY, Judge.

Respondent-mother L.M. and respondent-father B.S. ("father") are the parents of three sons, J.S., D.S., and B.S.[1] Respondent-mother is also the mother of D.M., whose custody is not at issue in this appeal.[2] Respondent-mother appeals from the entry of a permanency planning order that granted father legal and physical custody of the children, with respondent-mother to have visitation. On appeal, respondent-mother argues that in entering its permanency planning order, the trial court failed to comply with the requirements of N.C. Gen. Stat. § 7B-1000(a) (2015). For the reasons that follow, we conclude that respondent-mother's arguments lack merit and that she is not entitled to relief.

1. To protect their privacy, we refer to the minor children by their initials.

2. Because D.M.'s custody is not the subject of this appeal, references in this opinion to "the children" will refer to J.S., D.S., and B.S., unless otherwise specified.

I. Factual and Procedural History

In 2009, respondent-mother gave birth to a daughter, D.M., who has a different father than respondent-mother's other children. In 2011, twin boys were born to respondent-mother and father, and in 2012 the couple had another son. In 2013, the Wake County Department of Human Services (DHS) became involved with the family and on 14 January 2014, DHS filed petitions alleging that all four of respondent-mother's children were neglected. DHS obtained nonsecure custody of the children on 7 February 2014. On 26 February 2014, the trial court entered an order adjudicating the children to be neglected. The parents separated and a dispositional order was entered on 7 April 2014, continuing the children's legal custody with DHS and their physical placement with respondent-mother. Permanency planning orders were entered in 2014 and 2015, which provided that the permanent plan for the children was to be reunited with one of their parents.

In February 2015, DHS changed the physical placement of the children from respondent-mother to father, who was living with his parents. Between February 2015 and April 2016, the children lived with their father and paternal grandparents, but visited overnight with respondent-mother several days a week. On 8 April 2016, the trial court entered three orders in this case: a permanency planning order, an order transferring jurisdiction over the case from juvenile court to civil court, and a civil custody order. Regarding the transfer from juvenile to civil court, we note that:

> Although both juvenile proceedings and custody proceedings under Chapter 50 are before the District Court division, jurisdiction is conferred and exercised under separate statutes for the two types of actions. For that reason, we will refer to the District Court in this opinion as either the "juvenile court" or the "civil court" to avoid confusion. The "juvenile court" is the District Court exercising its exclusive, original jurisdiction in a matter pursuant to N.C. Gen. Stat. § 7B-200(a); the "civil court" is the District Court exercising its child custody jurisdiction pursuant to N.C. Gen. Stat. § 50-13.1, *et seq*.

Sherrick v. Sherrick, 209 N.C. App. 166, 169, 704 S.E.2d 314, 317 (2011). In its 8 April 2016 orders, discussed in detail below, the trial court (1) terminated the jurisdiction of juvenile court over this case and transferred jurisdiction to civil court for entry of a civil custody order; (2) entered a civil custody order awarding father the legal and primary physical

custody of the children and granting respondent-mother visitation privileges; and (3) entered a permanency planning order functionally identical to the civil custody order. On 12 April 2016, respondent-mother entered a notice of appeal from the permanency planning order. Respondent-mother did not appeal the civil custody order or the order transferring jurisdiction pursuant to N.C. Gen. Stat. § 7B-911.

II. Standard of Review

Our review of a permanency planning order entered pursuant to N.C. Gen. Stat. § 7B-906.1 is "limited to whether there is competent evidence in the record to support the findings and whether the findings support the conclusions of law. The trial court's findings of fact are conclusive on appeal when supported by any competent evidence, even if the evidence could sustain contrary findings." *In re J.H.*, __ N.C. App. __, __, 780 S.E.2d 228, 238 (2015) (internal quotations omitted). Factual findings that are not challenged on appeal are deemed to be supported by the evidence and are binding on appeal. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991). "In choosing an appropriate permanent plan under N.C. Gen. Stat. § 7B-906.1 [(2015)], the juvenile's best interests are paramount. We review a trial court's determination as to the best interest of the child for an abuse of discretion." *J.H.*, __ N.C. App. at __, 780 S.E.2d at 238 (2015) (internal quotation omitted).

III. Discussion

On appeal, respondent-mother acknowledges the standard of review of a permanency planning order. However, in her appellate brief, respondent-mother does not challenge the evidentiary support for any specific finding of fact or argue that the trial court's conclusions of law are not supported by its findings of fact. Nor does respondent-mother argue that it is not in the best interest of the children for their legal and primary physical custody to be with their father, or that the trial court failed to follow the requirements of N.C. Gen. Stat. § 7B-906.1. Although we could affirm the trial court's order on the basis of respondent-mother's failure to make a viable argument challenging the permanency planning order, because of the importance of a child custody order, we will review respondent-mother's appellate arguments.

On appeal, respondent-mother focuses solely upon the fact that the permanency planning order changed the visitation schedule set out in the previous permanency planning order, reducing respondent-mother's visitation with the children. Respondent-mother argues that

the permanency planning order failed to comply with N.C. Gen. Stat. § 7B-1000(a) (2015), which provides in relevant part that:

> Upon motion in the cause or petition, and after notice, the court may conduct a review hearing to determine whether the order of the court is in the best interests of the juvenile, and the court may modify or vacate the order in light of changes in circumstances or the needs of the juvenile.

The plain language of § 7B-1000(a) states that it is applicable to an order entered after a review hearing at which the trial court considers whether to modify or vacate a previously entered order "in light of changes in circumstances or the needs of the juvenile." Respondent-mother devotes most of her appellate brief to an argument that the trial court erred by failing to make findings of fact demonstrating that there was a change in circumstances between the entry of the prior permanency planning order and the order from which respondent-mother appealed. The premise of respondent-mother's argument is that entry of a permanency planning order is governed by N.C. Gen. Stat. § 7B-1000. However, the permanency planning order states, appropriately, that it is entered pursuant to N.C. Gen. Stat. § 7B-906.1, and respondent-mother fails to articulate any legal basis for applying N.C. Gen. Stat. § 7B-1000 to a permanency planning order that was entered under N.C. Gen. Stat. § 7B-906.1. We conclude that entry of a permanency planning order is governed by N.C. Gen. Stat. § 7B-906.1 and not by N.C. Gen. Stat. § 7B-1000.

Moreover, respondent-mother fails to acknowledge or discuss the implications of the fact that she appealed *only* from the permanency planning order, and did not appeal the order transferring jurisdiction from juvenile court to civil court, or the civil custody order. In the 8 April 2016 order that was entered pursuant to N.C. Gen. Stat. § 7B-911 (2015), the trial court stated in relevant part:

> 2. That this Court has previously determined that there is no longer a need for this file to remain open, [as DHS] is no longer actively involved in this case and the jurisdiction of this Court should terminate.
>
> 3. That the Juveniles' status and the issues in this case are in the nature of a private custody agreement or dispute and there is not a need for continued State intervention on behalf of the juvenile[s] through a Juvenile Court proceeding.
>
> That the Court is awarding custody to a parent.

> Wherefore, the jurisdiction of this Court is hereby terminated and the legal status of the juvenile[s] and the custodial rights of the parties shall be governed by a civil custody order entered pursuant to [N.C. Gen. Stat. §] 7B-911 as follows:
>
> 1. That a civil Order shall be entered in a new Civil Domestic file and the Clerk is hereby directed to treat said Order as the initiation of a civil action for custody and to open an appropriate file. . . .

On 8 April 2016, the trial court also entered the civil custody order referenced in its N.C. Gen. Stat. § 7B-911 order. In its custody order, the trial court concluded that it was in the best interest of the children for father to have their sole legal custody and primary physical custody, and for respondent-mother to have visitation privileges. The permanency planning order entered by the trial court the same day, from which respondent-mother has appealed, incorporates the civil custody order and makes the same determinations regarding custody of the children, although the civil custody order includes additional details regarding the parties' future interactions and the visitation schedule.

Respondent-mother does not argue that the permanency planning order affected or invalidated the civil custody order. Respondent-mother has not appealed from the civil custody order or from the order entered pursuant to N.C. Gen. Stat. § 7B-911, and does not argue that the trial court erred in these orders. As a result, even if this Court were to conclude that the trial court had erred in its permanency planning order, the civil custody order would remain in effect, mooting the effect of respondent-mother's challenge to the permanency planning order. Respondent-mother does not argue that the permanency planning order might carry collateral consequences such that, notwithstanding her failure to challenge the custody order, the issue of the propriety of the permanency planning order is not moot.

We conclude that respondent-mother's challenge to the permanency planning order on the basis of its failure to comply with N.C. Gen. Stat. § 7B-1000 lacks merit, and that the trial court's entry of both an order ending the jurisdiction of juvenile court and of a civil custody order renders moot the merits of the permanency planning order. Accordingly, the trial court's order is

AFFIRMED.

Judges STROUD and McCULLOUGH concur.

IN RE PATRON

[250 N.C. App. 375 (2016)]

IN THE MATTER OF UNWANA EYO PATRON, PETITIONER

No. COA16-322

Filed 15 November 2016

1. Jurisdiction—subject matter jurisdiction—child abuse—age of child at time of abuse

The trial court had jurisdiction in a child abuse case to hear appellant stepmother's petition for judicial review of the Department of Social Services' administrative decision to place appellant's name on the Responsible Individuals List. Although the child was 18 years old at the time of the hearing, he was under the age of 18 at the time appellant struck him.

2. Child Abuse, Dependency, and Neglect—child abuse—motion to stay proceedings—Responsible Individuals List—pending criminal charge arising out of same occurrence

The trial court did not abuse its discretion in a child abuse case by failing to grant appellant stepmother's motion to stay the proceedings regarding the Department of Social Services' administrative decision to place appellant's name on the Responsible Individuals List.. Prior resolution of the pending criminal charge of felonious assault arising out of the same transaction or occurrence as the juvenile petition was not required. Further, the trial court was not required to make findings of fact or conclusions of law.

3. Child Abuse, Dependency, and Neglect—child abuse—Responsible Individuals List—sufficiency of findings

The trial court did not err in a child abuse case by affirming the Department of Social Services' administrative decision to place appellant stepmother's name on the Responsible Individuals List. The findings of fact were supported by competent evidence, and the conclusions of law were supported by those findings.

Appeal by petitioner from order entered 9 November 2015 by Judge Scott C. Etheridge in Randolph County District Court. Heard in the Court of Appeals 19 October 2016.

Woodruff Law Firm, PA, by Jessica S. Bullock, for petitioner-appellant.

Randolph County Staff Attorney Erica Glass, for appellee Randolph County Department of Social Services.

ENOCHS, Judge.

Randolph County Department of Social Services ("RCDSS") began a child protective services investigation regarding the minor child AJP[1] on 26 January 2015 due to a report alleging that Petitioner Appellant Unwana Eyo Patron ("Appellant") had physically abused her step-son AJP by striking him in the back of the head with a coffee mug. After substantiating the allegations of abuse, RCDSS made the administrative decision to place Appellant's name on the Responsible Individuals List (RIL). Appellant was granted judicial review of this decision, and the trial court held a hearing and ultimately ordered Appellant's name to be added to the RIL. Because the trial court made findings of fact supported by competent evidence, and from these made proper conclusions of law, we affirm this order.

Factual Background

On 26 January 2015, AJP woke and prepared to go to school. He needed a document signed by a parent and so he approached Appellant in their kitchen for her signature. Appellant told AJP to get out of the house because he was wearing his shoes inside. AJP returned to his bedroom, removed his shoes, and then went back to the kitchen to ask again for Appellant's signature. When he returned to the kitchen, he picked up a coffee mug filled with pens with which Appellant could sign AJP's document. Appellant snatched the mug from AJP and told him "I thought I said get out." Because AJP was upset about the way Appellant was treating him, he called her "selfish" and turned to exit the kitchen. Appellant then struck AJP in the back of the head with the coffee mug.

After being stuck, AJP touched his head and saw that he was bleeding. Appellant tried to apologize, but AJP "told her not to touch [him] [.]" Appellant responded, "Well, then don't get blood on my floor[.]" AJP went to the bathroom to clean himself up but felt dizzy and lightheaded. He told his father what had happened and that he did not feel well, and his father took him to High Point Regional Hospital. At the hospital, AJP received four staples to close the wound. While at the hospital, AJP spoke with a social worker and a police officer and told them what had occurred.

At the time RCDSS began their investigation, AJP was 17 years old and resided in the home with his biological father, who was married

1. The initials "AJP" have been used throughout to protect the identity of the juvenile pursuant to Rule 3.1(b) of the North Carolina Rules of Appellate Procedure.

to Appellant, Appellant, and their three other children. Following an investigation of the incident with AJP, RCDSS substantiated the allegations of abuse and notified Appellant on 11 March 2015 that her name was to be placed on the RIL pursuant to N.C. Gen. Stat. § 7B-311(b) (2015). Appellant requested judicial review of RCDSS's decision to add her name to the RIL on 23 March 2015 by filing a Petition for Judicial Review: Responsible Individuals List. A hearing was held before the Honorable Scott C. Etheridge on 19 October 2015 in Randolph County District Court. Following the hearing, the trial court entered an order on 9 November 2015 placing Appellant's name on the RIL. It is from this order that Appellant timely appeals.

Analysis

A. Subject Matter Jurisdiction

[1] Jurisdiction is "[t]he legal power and authority of a court to make a decision that binds the parties to any matter properly brought before it." *Black's Law Dictionary* 929 (9th ed. 2009) (defining "judicial jurisdiction"). Subject matter jurisdiction, specifically, is " '[j]urisdiction over the nature of the case and the type of relief sought[.]' " *In re T.R.P.*, 360 N.C. 588, 590, 636 S.E.2d 787, 790 (2006) (quoting *Black's Law Dictionary* 857 (7th ed. 1999). "[W]hen there is a want of jurisdiction by the court over the subject matter . . .," the judgment is void. *Hart v. Thomasville Motors, Inc.*, 244 N.C. 84, 90, 92 S.E.2d 673, 678 (1956). "In reviewing a question of subject matter jurisdiction, our standard of review is *de novo*." *In re J.A.P. & I.M.P.*, 189 N.C. App. 683, 685, 659 S.E.2d 14, 16 (2008).

In the case *sub judice*, jurisdiction was granted to the district court by statute. Our General Assembly, "within constitutional limitations, can fix and circumscribe the jurisdiction of the courts of this State" by statute. *Bullington v. Angel*, 220 N.C. 18, 20, 16 S.E.2d 411, 412 (1941). The RIL and petitions for judicial review of decisions regarding who is added to the list exist pursuant to statute and are governed by Chapter 7B of the North Carolina General Statutes (the Juvenile Code). Jurisdiction over the RIL is also created by this governing statute. *See* N.C. Gen. Stat. §§ 7B-200, 7B-201, and 7B-311 (2015).

Article 2 of the Juvenile Code states in relevant part that "the [district] court has exclusive, original jurisdiction over any case involving a juvenile who is alleged to be abused, neglected, or dependent. . . . The court also has exclusive original jurisdiction of . . . [p]etitions for judicial review of a director's determination under Article 3A of this Chapter," which specifically governs the RIL. N.C. Gen. Stat. § 7B-200(a)(9).

Article 3A further defines the district court's jurisdiction in petitions for judicial review of these determinations. "[U]pon the filing of a petition for judicial review by an individual identified by a director as a responsible individual, the district court of the county in which the abuse or neglect report arose may review a director's determination of abuse or serious neglect *at any time* if the review serves the interests of justice or for extraordinary circumstances." N.C. Gen. Stat. § 7B-323(e) (2015) (emphasis added).

Appellant has argued that once AJP turned 18 years of age, the trial court's jurisdiction ended pursuant to N.C. Gen. Stat. § 7B-201(a), which states that jurisdiction shall continue either "until terminated by order of the court or until the juvenile reaches the age of 18 years . . . ." AJP was 18 years of age at the time of the hearing, and so Appellant argues that jurisdiction had terminated. However, whether AJP was 18 at the time of the hearing on the petition for judicial review is not relevant to our inquiry into the trial court's jurisdiction.

If the victim of abuse or serious neglect is a juvenile at the time of the incident that initiated a department of social services' "investigative assessment response that results in a determination of abuse or serious neglect and the identification of a responsible individual," then "the director shall personally deliver written notice of the determination to the identified individual." N.C. Gen. Stat. § 7B-320(a) (2015). For judicial review of this determination, the relevant inquiry is whether AJP was under the age of 18 at the time Appellant struck him.

During the hearing addressing Appellant's petition, Ashley Coddle, a registered nurse in the High Point Regional Hospital Emergency Room, testified that she had cared for AJP on 26 January 2015. It appears from the transcript of her testimony that AJP's medical records were allowed into evidence by stipulation. These medical records, introduced as RCDSS's Exhibit 2, contain numerous instances where AJP's birthday is shown.[2] Appellant has not argued that this birthdate was incorrect. Knowing AJP's birthdate, and the date of the incident, it is clear from this record that AJP was 17 years old, a minor, at the relevant time.

Because AJP was 17 years old at the time Appellant struck him, her name was properly added to the RIL. The addition of her name to this list could be reviewed by the district court "at any time." Thereby, the trial

2. To protect the identity of the juvenile pursuant to N.C.R. App. P. 3.1(b), AJP's birthdate is withheld.

court had jurisdiction to hear Appellant's petition for judicial review and this assignment of error is overruled.

B. Motion to Stay

[2] Appellant has argued that the trial court erred by failing to grant her motion to stay the proceedings. Appellant had been charged with feloniously assaulting AJP for the same assault that caused her name to be placed on the RIL. She makes a statutory argument that because she had been named "a defendant in a criminal court case resulting from the same incident," the trial court should have allowed those criminal proceedings to run their course before reviewing the petition for judicial review. N.C. Gen. Stat. § 7B-324(b) (2015). Furthermore, she argues that the trial court erred by failing to include in its order any findings with regard to her motion to stay the proceedings as required. We disagree.

"If an individual seeking judicial review is named as a . . . defendant in a criminal court case resulting from the same incident, the district court judge *may* stay the judicial review proceeding." *Id.* (emphasis added). The word "may" connotes a discretionary decision, not a mandatory one, and so we review the trial court's decision here, like any grant or denial of a motion to stay, for an abuse of discretion. *Muter v. Muter*, 203 N.C. App. 129, 132, 689 S.E.2d 924, 927 (2010).

This Court has held that

> [w]e do not re-weigh the evidence before the trial court or endeavor to make our own determination of whether a stay should have been granted. Instead, mindful not to substitute [our] judgment in place of the [trial court's], we consider only whether the trial court's denial was a patently arbitrary decision, manifestly unsupported by reason.

Id. at 134, 689 S.E.2d at 928 (internal citations and quotation marks omitted).

In this case, there was no statutory mandate that the trial court grant a stay. Furthermore, Article 8 of the Juvenile Code, the article that governs juvenile petition hearing procedures, states in pertinent part that "[r]esolution of a pending criminal charge against a respondent arising out of the same transaction or occurrence as the juvenile petition shall not be the sole extraordinary circumstance for granting a continuance." N.C. Gen. Stat. § 7B-803 (2015). The trial court here heard arguments from counsel for both Appellant and RCDSS and denied the request for the stay. Our review of this denial of Appellant's motion to stay is not

to "consider . . . whether we might disagree with the trial court, but whether the trial court's actions are fairly supported by the record." *State v. Lasiter*, 361 N.C. 299, 302, 643 S.E.2d 909, 911 (2007) (citing *Wainwright v. Witt*, 469 U.S. 412, 434, 83 L.Ed.2d 841, 858 (1985)). In this case, the transcript of the hearing shows that counsel for RCDSS gave the trial court several legitimate reasons for denying the motion. Therefore, the trial court's denial of the stay was neither patently arbitrary nor unsupported by reason and this portion of Appellant's argument is without merit.

Furthermore, the trial court was not required to make findings of fact or conclusions of law regarding Appellant's motion to stay. Rule 52(a)(1) of the North Carolina Rules of Civil Procedure states that "[i]n all actions tried upon the facts without a jury or with an advisory jury, the [trial] court shall find the facts specifically and state separately its conclusions of law." However, it also states that "[f]indings of fact and conclusions of law are necessary on decisions of any motion . . . only when requested by a party . . . ." N.C.R. Civ. P. 52(a)(2). This Court has stated that "absent a specific request made pursuant to Rule 52(a)(2), a trial court is not required to either state the reasons for its decision or make findings of fact showing those reasons." *Strickland v. Jacobs*, 88 N.C. App. 397, 399, 363 S.E.2d 229, 230 (1988). Furthermore, when "there is no suggestion in the record that [the] defendant asked for findings of fact or conclusions of law to be included in the trial court's order, the court's failure to do so is not reversible error." *Granville Med. Ctr. v. Tipton*, 160 N.C. App. 484, 494, 586 S.E.2d 791, 798 (2003). Because there was no request made by Appellant for specific findings of fact or conclusions of law as to her motion, this portion of Appellant's argument is without merit.

C. Placement on the Responsible Individuals List

[3] A "[r]esponsible individual" is statutorily defined as "[a] parent, guardian, custodian, or caretaker who abuses or seriously neglects a juvenile." N.C. Gen. Stat. § 7B-101(18a) (2015). The Department of Health and Human Services "shall . . . maintain a list of responsible individuals" and "may provide information from this list to child caring institutions, child placing agencies, group home facilities, and other providers of foster care, child care, or adoption services that need to determine the fitness of individuals to care for or adopt children." N.C. Gen. Stat. § 7B-311(b). After "[t]he court determines that the individual is a responsible individual as a result of a hearing on the individual's petition for judicial review," their name shall be placed on the RIL. N.C. Gen. Stat. § 7B-311(b)(2).

"If the district court undertakes [a review of a director's determination of abuse or serious neglect], a hearing shall be held pursuant to [Section 7B-323] at which the director shall have the burden of establishing by a preponderance of the evidence abuse or serious neglect and the identification of the individual seeking judicial review as a responsible individual." N.C. Gen. Stat. § 7B-323(e). If, after the hearing, the court concludes that the director has not met his burden of establishing either the abuse or serious neglect, or that the Appellant was the responsible individual, the court shall reverse the director and expunge Appellant's name from the RIL. *Id.*

Appellant argues that the trial court erred in making several findings of fact that were not supported by competent evidence, and also that the trial court's conclusions of law were not supported by its findings. Therefore, we must review the trial court's order adjudicating Appellant a responsible individual. In reviewing this order, we must determine whether the findings of fact are supported by competent evidence, and whether the legal conclusions are supported by the findings of fact. *In re F.C.D.*, ___ N.C. App. ___, ___, 780 S.E.2d 214, 217 (2015). "If supported by competent evidence, the trial court's findings are binding on appeal even if the evidence would also support contrary findings." *In re F.C.D.*, ___ N.C. App. at ___, 780 S.E.2d at 217. "Where no exception is taken to a finding of fact by the trial court, the finding is presumed to be supported by competent evidence and is binding on appeal." *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991). "Its conclusions of law, however, are reviewed *de novo*." *In re F.C.D.*, ___ N.C. App. at ___, 780 S.E.2d at 217.

Appellant has challenged Findings of Fact Numbers 2, 5 through 10, and 13 in the trial court's order, as well as each of the conclusions of law. Therefore, we shall take each in turn to determine whether the findings of fact are supported by competent evidence, and then whether these findings support the conclusions of law. However, Finding of Fact 2 states that "[t]his [c]ourt has subject matter jurisdiction of this matter[,]" and Conclusion of Law 1 states this same proposition. Because we have already determined this issue above, we shall not address it here.

The trial court made the following challenged findings of fact in support of its conclusion that "[t]he minor child [AJP] is an abused child" and that "[t]he petitioner [Appellant] is the responsible individual and her name should be submitted to be placed on the responsible individual's list":

5. The [c]ourt admitted into evidence High Point Regional Hospital medical records from the minor child [AJP] (RCDSS's exhibit #2); nine pictures of the minor child's injury (RCDSS's exhibit #1), and Petitioner's exhibit #1 (five pictures of Petitioner). In addition, the [c]ourt received testimony from the minor child [AJP] (hereinafter referred to as the minor child), [AJP's father], Officer Clifford Chewning Jr., and Petitioner [Appellant].

6. On or about January 26, 2015, the minor child lived . . . in Archdale, North Carolina with [Appellant], the minor child's father . . ., and the minor child's three siblings . . . .

7.[3] On this January 26, 2015, [Appellant] came home from work around 2 a.m. and when she came into the home, she woke the minor child and [AJP's father] up to ask why a dresser was in the living room and she requested the minor child to clean up the kitchen. The minor child cleaned up the kitchen. When the minor child woke up for school later that morning on January 26, 2015, the minor child went to the kitchen to attempt to retrieve a pen from a coffee mug to get some documents for school signed. [Appellant] told the minor child to leave the house because he had on sneakers. The minor child went to his room to take off his sneakers. The minor child went back to the kitchen to attempt to retrieve a pen from a coffee mug again, but [Appellant] cut in front of the minor child and grabbed the coffee mug. She told the minor child to get out again, and the minor child called [Appellant] "selfish." When the minor child turned to walk away from [Appellant], she hit the minor child on the crown of his head with a white coffee mug.

7. After this incident, the minor child bled profusely and [Appellant] told the minor child "don't get blood on my floor and go to the bathroom." Subsequently, the minor child went to the bathroom and he informed his father . . . that he was feeling dizzy and lightheaded.

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3. Within the trial court's order there were two findings of fact labeled 7, and two labeled 8. This seems to be a typographical error.

[AJP's father] and the minor child left the home and went to High Point Regional Hospital.

8. The minor child was treated at High Point Regional Hospital for the gash to his head.

8. Officer Clifford Chewning, Jr. with the Archdale Police Department was called to the home of [AJP's father] and [Appellant] on January 26, 2015. When Officer Chewning arrived at the home, he spoke with [Appellant] and she told Officer Chewning that everything was found [sic] and that she had an altercation with [AJP's father] and the minor child. She did not tell Officer Chewning that she had hit the minor child in the head with a coffee mug. After Officer Chewning left the home, he spoke with the minor child at High Point Regional Hospital and the minor child told him that [Appellant] and he had argued around 2 am on January 26, 2015 regarding his father moving a chest of drawers. In addition, around 7 a.m., the minor child was going to get a pen from a mug, and [Appellant] grabbed the mug and hit him on the back of his head with the mug.

9. Officer Chewning did observe the gash of the back of the minor child's head on January 26, 2015 at High Point Regional Hospital.

10. Officer Chewning also spoke with [AJP's father]. [AJP's father] told Officer [Chewning] he did not witness the incident, but he heard the mug hit the minor child's head and he observed the minor child bleed from the gash on his head. He also observed [Appellant] tell the minor child not to bleed on the floor. [AJP's father] took the minor child to the hospital.

. . . .

13. The [Appellant's] version of the series of events that led to the January 26, 2015 event with the minor child are not consistent with the facts that were presented in this case.

With regards to the findings of fact, Appellant first specifically challenges the references to AJP as a "minor child" in Findings of Fact 5, 6, and 8. We have addressed AJP's age, and at what point in these proceedings that his age was relevant, in the above section addressing

jurisdiction. Therefore, we will only note that the introduction of AJP's medical records through Ashley Coddle gave competent and undisputed evidence from which the trial court could determine and find as fact that AJP was a "minor child" at the relevant time with regards to this petition for review. Therefore, this finding will not be disturbed on appeal.

Appellant has also argued that the trial court's findings of fact 7 through 10 (which is, in fact, six findings of fact as there were two findings labeled 7, and two labeled 8) were made without sufficient specificity and were simply recitations of witness' testimony. "[A] proper finding of facts requires a specific statement of the facts on which the rights of the parties are to be determined, and those findings must be sufficiently specific to enable an appellate court to review the decision and test the correctness of the judgment." *Quick v. Quick*, 305 N.C. 446, 451, 290 S.E.2d 653, 657 (1982). However, in light of the record, the challenged findings of fact are sufficiently specific to enable our review. They give the relevant evidentiary facts from which the ultimate facts and conclusions could be found, *i.e.*, that Appellant's version of events was inconsistent with the other facts presented, that AJP was abused, and that Appellant was the responsible individual.

Finally, Appellant challenges Finding of Fact 13, and argues that the trial court failed to make a finding of fact with regard to her self-defense claim raised during the hearing. However, "when a trial judge sits as both judge and juror, as he or she does in a non-jury proceeding, it is that judge's duty to weigh and consider all competent evidence, and pass upon the credibility of the witnesses, the weight to be given their testimony and the reasonable inferences to be drawn therefrom." *In re Whisnant*, 71 N.C. App. 439, 441, 322 S.E.2d 434, 435 (1984) (internal quotation marks omitted). It is not within this Court's purview to reweigh the evidence, as we are only to determine whether the findings of fact are supported by competent evidence and, if so, these are binding on appeal. *See In re F.C.D.*, ___ N.C. App. at ___, 780 S.E.2d at 217. If the trial court did not make a finding of fact with regards to Appellant's self-defense claim, it simply means that the trial court was not convinced that it was valid. "[I]t is well established that when the facts found by the trial court are 'sufficient to determine the entire controversy,' the court's 'failure to find other facts is not error.' " *Smallwood v. Smallwood*, ___ N.C. App. ___, ___, 742 S.E.2d 814, 822 (2013) (quoting *Graybar Elec. Co. v. Shook*, 283 N.C. 213, 217, 195 S.E.2d 514, 516 (1973)). Therefore, this portion of Appellant's argument is overruled.

Each of the findings of fact set out in the trial court's order was supported by competent evidence. We now review the trial court's conclusions of law *de novo*. The first conclusion of law was that the court had

subject matter jurisdiction over this matter. Because we have addressed this above, we shall not do so again.

The second conclusion of law was that "[t]he minor child [AJP] is an abused child," or juvenile. The Juvenile Code defines an abused juvenile as "[a]ny juvenile less than 18 years of age whose parent, guardian, custodian, or caretaker . . . [i]nflicts or allows to be inflicted upon the juvenile a serious physical injury by other than accidental means[.]" N.C. Gen. Stat. § 7B-101(1)(a). As discussed above, the trial court made the finding of fact that AJP was a minor child. It is not challenged that Appellant was a "parent, guardian, custodian, or caretaker." *Id.* Appellant argues that there was no competent evidence that the serious physical injury was inflicted "by other than accidental means." *Id.* However, the testimony of AJP tends to establish that when Appellant struck him in the head it was intentional, by other than accidental means. As stated above, if the trial court does not make a finding, it simply means that the trial court was not convinced that a fact existed. The trial court did not find that the serious injury was inflicted by accidental means; and therefore, this court can infer that it was inflicted by "other than accidental means." *Id.* We affirm this conclusion of law because it was without error.

Finally, the trial court concluded that "[Appellant] is the responsible individual and her name should be submitted to be placed on the responsible individual's list." A responsible individual is "[a] parent, guardian, custodian, or caretaker who abuses or seriously neglects a juvenile." N.C. Gen. Stat. § 7B-101(18a). Appellant was a "parent, guardian, custodian, or caretaker," and, as shown above, "abuse[d]" AJP, therefore, she is a responsible individual. *Id.* Because "[t]he name of an individual who has been identified as a responsible individual *shall* be placed on the responsible individual list . . . after . . . [t]he court determines that the individual is a responsible individual as a result of a hearing on the individual's petition for judicial review" (emphasis added), N.C. Gen. Stat. § 7B-311(b)(2) required the trial court to conclude as a matter of law that Appellant's name be placed on the responsible individual's list. Therefore, this conclusion of law was also without error.

Conclusion

For the reasons set out above, each of Appellant's arguments are overruled. Therefore, the order of the trial court finding that Appellant was a responsible individual and placing her name on the RIL is affirmed.

AFFIRMED.

Judges DAVIS and INMAN concur.

IN RE T.R.

[250 N.C. App. 386 (2016)]

IN THE MATTER OF T.R.

No. COA16-597

Filed 15 November 2016

Child Custody and Support—child custody—Uniform Child-Custody Jurisdiction and Enforcement Act—subject matter jurisdiction

The trial court had subject matter jurisdiction under the Uniform Child-Custody Jurisdiction and Enforcement Act to issue the 8 March 2016 order granting custody of the minor child to her father. All of the requirements of N.C.G.S. § 50A-201(a)(2) were satisfied. Further, the Illinois court determined that North Carolina would be a more convenient forum.

Appeal by respondent-mother from order entered 8 March 2016 by Judge Monica M. Bousman in Wake County District Court. Heard in the Court of Appeals 19 October 2016.

Office of the Wake County Attorney, by Roger A. Askew, for petitioner-appellee Wake County Human Services.

Robert W. Ewing for respondent-appellant.

Michael N. Tousey for guardian ad litem.

DAVIS, Judge.

M.R. ("Respondent") appeals from an order granting custody of her juvenile daughter, T.R. ("Tina"), to the child's father, "Ted."[1] Respondent argues that the trial court lacked subject matter jurisdiction under the Uniform Child-Custody Jurisdiction and Enforcement Act ("UCCJEA") to issue the order from which she appeals. After careful review, we affirm.

Factual Background

Tina was born in 2007 in Springfield, Illinois to Respondent and Ted, who at the time were married. They separated in 2009 after Ted abandoned Respondent and Tina. On 7 January 2011, the Circuit Court of

1. Pseudonyms and initials are used throughout this opinion to protect the identities of the juveniles and for ease of reading. N.C. R. App. P. 3.1(b).

Sangamon County, Illinois issued an order dissolving the marriage and granting custody of Tina to Respondent subject to Ted's visitation rights.

In February 2012, Respondent — who is a migrant worker — moved with Tina and "Vanessa," Respondent's daughter from another relationship, from Illinois to Florida. They lived in Florida until 18 June 2014 when they moved to North Carolina. They lived in various places within North Carolina, including a migrant worker camp in New Hanover County. Respondent's work in North Carolina entailed recruiting and transporting migrant workers to a farm in Currie, North Carolina. Ted has continued to live in Illinois.

On 25 July 2014, Wake County Human Services ("WCHS") filed a juvenile petition in Wake County District Court alleging that Tina (then 7 years old) and Vanessa (then 12 years old) were neglected juveniles pursuant to N.C. Gen. Stat. § 7B-101 in that they did not receive proper care, supervision, or discipline from Respondent and lived in an environment injurious to their welfare. *See* N.C. Gen. Stat. § 7B-101(15) (2015). The petition included allegations that (1) while Respondent was at work, Vanessa had been raped by a man in the migrant worker housing development where they lived; (2) Vanessa worked for 11 hours each day doing field work; (3) Vanessa and Tina were often left alone while Respondent worked; and (4) Tina had reported that Respondent's boyfriend had touched Tina's genitalia on one occasion.

On 25 July 2014, the Honorable Monica M. Bousman entered an order in Wake County District Court granting WCHS non-secure custody of the children. A child planning conference was held on 30 July 2014, and a memorandum of understanding produced after the conference acknowledged that Respondent had been granted custody of Tina in the 2011 divorce proceeding in Sangamon County, Illinois. It also noted that Respondent had reported she was currently living in Florida.

On 3 September 2014, Judge Bousman contacted Judge April Troemper of the Circuit Court of Sangamon County regarding the case. As a result of this conversation, on 17 September 2014 Judge Troemper made the following docket entry:

> On 9/3/14, the Court received a call from Judge Bousman from North Carolina Juvenile Court regarding a pending matter involving the minor child [Tina]. The Courts discussed the status of the case in Illinois and in North Carolina and exchanged relevant documentation to determine the issue of jurisdiction. Upon further consideration and on the Court's own Motion, this Court is transferring

> jurisdiction of this file, including the pending motion to modify custody to Wake County, North Carolina. The minor child has not resided in the State of Illinois since approximately January 2012. The Court finds it is in the minor child's best interest to have custody matters addressed by the Courts in North Carolina where the allegations of abuse occurred. As such, the Court's mediation order is vacated. Clerk [is] instructed to prepare file for transfer and to send copy of this docket to the parties of record.[2]

In a subsequent order, Judge Bousman made the following finding of fact: "Jurisdictional issues with respect to the child, [Tina], have been resolved. [Circuit] Court Judge Troemper of Sangamon County, Illinois, has determined that the proper forum for this matter is the State of North Carolina." In this order, Judge Bousman also made the following conclusion of law: "Jurisdictional issues with respect to [Tina] have been resolved and North Carolina is the proper forum for the adjudication and disposition in this matter."

The trial court held an adjudication hearing on 13 November 2014 and a dispositional hearing on 9 December 2014. On 9 January 2015, the court issued an order adjudicating Tina and Vanessa to be neglected juveniles and a dispositional order keeping the children in WCHS's custody. In a 27 April 2015 order, the trial court placed Tina in a trial placement with Ted.

After holding a permanency planning hearing that began on 26 January 2016, the trial court issued a permanency planning order on 8 March 2016 finding that (1) Respondent was not progressing in her case plan; (2) reunification efforts with Respondent were contrary to Tina's health and safety; and (3) Tina was "doing very well in her trial placement with [Ted]." In that order, the court gave Ted custody of Tina and suspended Respondent's visitation rights pending further review by Tina's therapist. Respondent filed a timely appeal from the trial court's 8 March 2016 order.

Analysis

Respondent's sole argument on appeal is that the trial court lacked subject matter jurisdiction under the UCCJEA to issue the 8 March 2016

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2. There is no indication in the record that Respondent either failed to receive a copy of this docket entry or attempted to appeal Judge Troemper's transfer of the case to North Carolina.

order granting custody of Tina to Ted. The issue of whether a trial court possesses jurisdiction under the UCCJEA is a question of law that we review *de novo*. *In re J.H.*, __ N.C. App. __, __, 780 S.E.2d 228, 233 (2015).

The UCCJEA serves to "[a]void jurisdictional competition and conflict with courts of other States in matters of child custody" and to "[p]romote cooperation with the courts of other States to the end that a custody decree is rendered in that State which can best decide the case in the interest of the child[.]" N.C. Gen. Stat. § 50A-101 (Official Comment) (2015). Under the UCCJEA, once a court of one state makes an initial child custody determination, that state ordinarily has "exclusive, continuing jurisdiction over the determination . . . ." N.C. Gen. Stat. § 50A-202(a) (2015). However, the UCCJEA contains provisions setting out several circumstances under which the courts of a second state *are* permitted to exercise jurisdiction over — and modify — a prior custody determination from the original state. *See* N.C. Gen. Stat. §§ 50A-202, 203, 204.

In the present case, we conclude that subject matter jurisdiction existed to support the trial court's 8 March 2016 order based on N.C. Gen. Stat. § 50A-203.[3] Under the applicable provisions of N.C. Gen. Stat. § 50A-203, a North Carolina court may modify an out-of-state child custody determination if both (1) North Carolina "has jurisdiction to make an initial determination under G.S. 50A-201(a)(1) or G.S. 50A-201(a)(2)" *and* (2) "[t]he court of the other state determines it no longer has exclusive, continuing jurisdiction under G.S. 50A-202[4] *or* that a court of this State would be a more convenient forum under G.S. 50A-207[.]" N.C. Gen. Stat. § 50A-203(1) (emphasis added). We address each of these two requirements in turn.

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3. We note that Respondent does not argue that the trial court lacked temporary emergency jurisdiction pursuant to N.C. Gen. Stat. § 50A-204 to enter its initial non-secure custody order. *See* N.C. Gen. Stat. § 50A-204(a) (2015) ("A court of [North Carolina] has temporary emergency jurisdiction if the child is present in [North Carolina] and the child has been abandoned or it is necessary in an emergency to protect the child because the child, or a sibling or parent of the child, is subjected to or threatened with mistreatment or abuse."). Rather, Respondent argues that the trial court's temporary emergency jurisdiction could not have served as a basis for making a final custody determination. For the reasons set forth herein, however, we conclude that the 8 March 2016 order was properly issued pursuant to the trial court's jurisdiction under N.C. Gen. Stat. § 50A-203(1) rather than under N.C. Gen. Stat. § 50A-204.

4. The exceptions set forth in N.C. Gen. Stat. § 50A-202 are not applicable to the present case.

I. Existence of Jurisdiction for North Carolina Court to Make Initial Custody Determination Under N.C. Gen. Stat. § 50A-201(a)(2)

N.C. Gen. Stat. § 50A-201(a)(2) provides, in pertinent part, that North Carolina may make an initial child custody determination if

> (2) . . . a court of the home state of the child has declined to exercise jurisdiction on the ground that [North Carolina] is the more appropriate forum under G.S. 50A-207[5] . . . *and*:
>
> a. The child and the child's parents, or the child and at least one parent or a person acting as a parent, have a significant connection with [North Carolina] other than mere physical presence; *and*
>
> b. Substantial evidence is available in [North Carolina] concerning the child's care, protection, training, and personal relationships[.]

N.C. Gen. Stat. § 50A-201(a)(2) (emphasis added).

Here, the trial court possessed jurisdiction to make an initial custody determination under N.C. Gen. Stat. § 50A-201(a)(2) based on Judge Troemper's docket entry, which provided that the Illinois court was transferring the matter to Wake County District Court because Tina had not lived in Illinois since 2012 and the abuse had occurred in North Carolina. This ruling was tantamount to a determination that North Carolina was "the more appropriate forum" for purposes of N.C. Gen. Stat. § 50A-201(a)(2). The docket entry explained that after Judge Bousman and Judge Troemper had communicated with each other and exchanged relevant documents, Judge Troemper decided to "transfer[ ] jurisdiction of this file, including the pending motion to modify custody to Wake County, North Carolina" and that it was in the best interest of Tina to have custody issues adjudicated in North Carolina.

Respondent argues in her brief that the record is devoid of any order from an Illinois court determining that it no longer possessed exclusive,

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5. N.C. Gen. Stat. § 50A-207, in turn, provides in pertinent part that "[a] court of this State which has jurisdiction . . . to make a child-custody determination may decline to exercise its jurisdiction at any time if it determines that it is an inconvenient forum under the circumstances, and that a court of another state is a more appropriate forum." N.C. Gen. Stat. § 50A-207(a) (2015).

continuing jurisdiction or that a North Carolina court would be a more convenient forum. Respondent briefly acknowledges the Illinois docket entry but summarily asserts in a footnote that the docket entry is "not a court order sufficient to meet the requirements" of N.C. Gen. Stat. § 50A-203. However, Respondent does not provide any valid argument as to *why* the docket entry does not suffice as an order of the Illinois court for purposes of the UCCJEA.

The Illinois Court of Appeals "has accepted a docket sheet entry as an order of the court where there was no transcript of the hearing and no written order." *Severino v. Freedom Woods, Inc.*, 407 Ill. App. 3d 238, 250, 941 N.E.2d 180, 191 (2010) (citation omitted), *appeal denied*, 350 Ill. Dec. 873, 949 N.E.2d 665 (2011). Therefore, Illinois' own courts have acknowledged that a docket entry can serve as a court order where — as here — the docket entry is unaccompanied by a separate order or a hearing transcript.

Furthermore, Judge Troemper's docket entry possesses all of the substantive attributes of a court order. It reaches the conclusion that the case should be transferred from the courts of Illinois to the courts of North Carolina and fully explains its rationale for that conclusion. Moreover, as noted above, there is no indication in the record before us that Respondent did not receive a copy of the docket entry from the Illinois court or that Respondent made any effort to appeal Judge Troemper's ruling. As this Court has previously observed, "[n]othing in the UCCJEA requires North Carolina's district courts to undertake collateral review of a facially valid order from a sister state before exercising jurisdiction pursuant to N.C. Gen. Stat. § 50A-203(1)." *In re N.B.*, __ N.C. App. __, __, 771 S.E.2d 562, 566 (2015).

With regard to the additional requirements under N.C. Gen. Stat. § 50A-201(a)(2), the record shows that (1) Tina and Respondent had a "significant connection with [North Carolina] other than mere physical presence" in that they were living — and Respondent was working — in North Carolina at the time of the acts giving rise to the juvenile petition filed by WCHS; and (2) "[s]ubstantial evidence is available in [North Carolina] concerning [Tina's] care, protection, training, and personal relationships" in that the sexual assault against Tina — as well as other acts of neglect by Respondent involving Tina — occurred in North Carolina. Therefore, all of the requirements of N.C. Gen. Stat. § 50A-201(a)(2) were satisfied.

II. Determination By Illinois Court That North Carolina Would Be More Convenient Forum

The final pertinent requirement for the existence of subject matter jurisdiction in the trial court under N.C. Gen. Stat. § 50A-203(1) is that the Illinois court must have determined that North Carolina "would be a more convenient forum" for a determination of custody. Once again, for the reasons set out above, this requirement was satisfied by Judge Troemper's docket entry transferring the case to Wake County District Court.

Accordingly, Respondent has failed to demonstrate that the trial court lacked subject matter jurisdiction to enter its 8 March 2016 order. As such, this order is affirmed.

Conclusion

For the reasons stated above, we affirm.

AFFIRMED.

Judges INMAN and ENOCHS concur.

JESSIE NORTON, IN HER INDIVIDUAL CAPACITY AND IN HER CAPACITY AS THE EXECUTOR OF THE ESTATE OF NORMAN CHRISTOPHER NORTON, WILLIAM NORTON, AND DANIEL MICHAEL NORTON, PLAINTIFFS

v.

SCOTLAND MEMORIAL HOSPITAL, INC., AND DUKE UNIVERSITY HEALTH SYSTEM, INC., DEFENDANT

No. COA16-530

Filed 15 November 2016

1. Wrongful Death—loss of consortium—failure to comply with Rule 9(j)

The trial court did not err by dismissing plaintiffs' wrongful death and loss of consortium claims based on failure to comply with Rule 9(j).

2. Statutes of Limitation and Repose—wrongful death—loss of consortium

The trial court's unchallenged dismissal of the wrongful death and loss of consortium actions under Rule 12(b)(6) for failure to file the claims within the statute of limitations remained undisturbed.

3. Appeal and Error—preservation of issues—failure to argue

Although plaintiffs argued that the negligence and negligent infliction of emotional distress claims were not "medical malpractice" claims and did not require a Rule 9(j) certification, plaintiffs failed to challenge the trial court's dismissal of these negligence claims pursuant to Rule 12(b)(6) for failure to state a claim. Any argument challenging the trial court's dismissal of those claims under Rule 12(b)(6) was abandoned.

4. Emotional Distress—intentional infliction of emotional distress—premature dismissal

The trial court's dismissal under Rule 12(b)(6) of plaintiffs' intentional infliction of emotional distress allegation against Scotland Memorial was premature and was reversed.

5. Emotional Distress—intentional infliction of emotional distress—dismissal

The trial court did not err by dismissing plaintiffs' intentional infliction of emotional distress claim against Duke Hospital.

Appeal by plaintiffs from order entered 23 February 2016 by Judge Richard T. Brown in Scotland County Superior Court. Heard in the Court of Appeals 3 October 2016.

Peterkin Law Firm, PLLC, by Timothy J. Peterkin, for plaintiff-appellants.

Brotherton Ford Berry & Weaver, PLLC, by Robert A. Ford and Demetrius W. Berry, for defendant-appellee Scotland Memorial Hospital, Inc.

Young Moore and Henderson, P.A., by Angela Farag Craddock, Donna Renfrow Rutala, and David A. Senter, for defendant-appellee Duke University Health System, Inc.

TYSON, Judge.

Plaintiffs appeal from the trial court's order dismissing their complaint under Rules 9(j) and 12(b)(6) of the Rules of Civil Procedure against defendants, Scotland Memorial Hospital, Inc. ("Scotland Memorial") and Duke University Health System, Inc. ("Duke Hospital"). We affirm in part, reverse in part, and remand.

I. Background

Norman Christopher Norton was admitted to Scotland Memorial in Laurinburg, North Carolina on 9 July 2012 with complaints of abdominal pain. Mr. Norton was married to plaintiff Jessie Norton, and is the father of the couple's two children, also plaintiffs. Mr. Norton was fairly active and in good health.

While a patient at Scotland Memorial, Mr. Norton's condition worsened. He was transferred to the intensive care unit, placed on a ventilator, and subsequently died. It is unclear from the face of the complaint whether Mr. Norton died at Scotland Memorial or after he was transferred to Duke University Hospital in Durham, North Carolina. Duke Hospital's responsive pleading states Mr. Norton's deceased body was transferred to Duke Hospital on 11 July 2012. Scotland Memorial's responsive pleading states Mr. Norton's body was transferred to Duke Hospital on 12 July 2012.

Plaintiffs filed a complaint against Scotland Memorial and Duke Hospital on 10 July 2015. Plaintiffs allege Mr. Norton screamed and cried out several times for his wife and children, but Scotland Memorial staff refused to allow Mr. Norton's wife or family to see him.

The complaint alleges Mr. Norton's cries were so loud and adamant that other visitors in the waiting room commented. Mrs. Norton informed staff that she had waited an excessive amount of time to see her husband. Staff members sat beside her in the waiting room, but refused to allow her to see her husband. The complaint further alleges that neither Mr. Norton nor Mrs. Norton gave permission for Mr. Norton to be removed from the ventilator.

The complaint further alleges Duke Hospital staff asked Mrs. Norton if she wished for an autopsy to be performed, and she responded in the affirmative. The complaint alleges Mrs. Norton requested for Mr. Norton's head not to be cut during the autopsy. She had previously discussed this issue with Mr. Norton, and he had indicated it was important to him. Duke Hospital staff informed Mrs. Norton they were required to cut Mr. Norton's head based upon the orders received from Scotland Memorial.

The complaint also alleges Mr. Norton had previously agreed to be an organ donor, but declined to remain an organ donor when he renewed his driver's license. He had also discussed this issue with Mrs. Norton. Mrs. Norton was informed by the funeral home that Mr. Norton's organs and eyes had been removed from his body.

Plaintiffs' complaint alleges five causes of action against both defendants: (1) negligent infliction of emotional distress; (2) intentional infliction of emotional distress; (3) loss of consortium; (4) negligence; and (5) wrongful death. Both defendants filed motions to dismiss under Rule 12(b)(6) for failure to state a claim upon which relief may be granted and under Rule 9(j) for failure to plead that a qualified expert had reviewed the medical care and records prior to filing the complaint.

On 23 February 2016, the trial court dismissed Plaintiffs' claims against both defendants with prejudice for failure to comply with the requirements of Rule 9(j). The court also concluded Plaintiffs' wrongful death claims against the defendants were barred by the statute of limitations, and dismissed those claims under Rule 12(b)(6). The trial court also dismissed Plaintiffs' remaining claims under 12(b)(6) for failure to state a claim upon which relief may be granted. Plaintiffs appeal.

II. Dismissal of Plaintiffs' Claims

The trial court dismissed Plaintiffs' claims under three separate grounds: (1) failure to meet the requirements of Rule 9(j) for the medical malpractice claims; (2) failure to file the complaint within the applicable statute of limitations for the wrongful death and loss of consortium claims; and (3) failure to state a claim under Rule 12(b)(6).

A. Standards of Review

A trial court's order dismissing a complaint pursuant to Rule 9(j) presents a question of law, and is therefore reviewed *de novo* on appeal. *Barringer v. Wake Forest Univ. Baptist Med. Ctr.*, 197 N.C. App. 238, 256, 677 S.E.2d 465, 477, *disc. review denied*, 363 N.C. 651, 684 S.E.2d 690 (2009).

> On appeal from a motion to dismiss under Rule 12(b)(6), this Court reviews *de novo* "whether, as a matter of law, the allegations of the complaint . . . are sufficient to state a claim upon which relief may be granted [.]" We consider the allegations in the complaint true, construe the complaint liberally, and only reverse the trial court's denial of a motion to dismiss if plaintiff is entitled to no relief under any set of facts which could be proven in support of the claim.

Christmas v. Cabarrus Cty., 192 N.C. App. 227, 231, 664 S.E.2d 649, 652 (2008) (quoting *Harris v. NCNB*, 85 N.C. App. 669, 670, 355 S.E.2d 838, 840 (1987)), *disc. review denied*, 363 N.C. 372, 678 S.E.2d 234 (2009).

B. Dismissal of Wrongful Death and Loss of Consortium Claims

1. Rule 9(j)

[1] The trial court determined Plaintiffs had brought a "medical malpractice action" as defined by N.C. Gen. Stat. § 90-21.11, and dismissed all of Plaintiffs' claims for failure to comply with Rule 9(j).

Rule 9(j) of the North Carolina Rules of Civil Procedure requires dismissal of any complaint alleging medical malpractice, unless the pleading asserts a medical expert has reviewed the medical care and records, and would testify that the medical care did not comply with the applicable standard of care set forth in N.C. Gen. Stat. § 90-21.12. N.C. Gen. Stat. § 1A-1, Rule 9(j) (2015). A "medical malpractice action" is defined as either of the following:

> a. A civil action for damages for personal injury or death arising out of the furnishing or failure to furnish professional services in the performance of medical, dental, or other health care by a health care provider.
>
> b. A civil action against a hospital . . . for damages for personal injury or death, when the civil action (i) alleges a breach of administrative or corporate duties to the patient, including, but not limited to, allegations of negligent credentialing or negligent monitoring and supervision and (ii) arises from the same facts or circumstances as a claim under sub-subdivision a. of this subdivision.

N.C. Gen. Stat. § 90-21.11(2) (2015).

"Rule 9(j) unambiguously requires a trial court to dismiss a complaint if the complaint's allegations do not facially comply with the rule's heightened pleading requirements." *Barringer*, 197 N.C. App. at 255, 677 S.E.2d at 477.

Plaintiffs' loss of consortium claim is derivative of, and relies upon the validity of the spouse's claim for injury or wrongful death. *See*, *e.g.*, *Sloan v. Miller Building Corp.*, 128 N.C. App. 37, 40, 493 S.E.2d 460, 462 (1997). Plaintiffs have failed to show how their claims for wrongful death and loss of consortium do not arise from medical malpractice under the definitions set forth in N.C. Gen. Stat. § 90-21.11(2), which require a Rule 9(j) medical expert's certification. The trial court properly dismissed Plaintiffs' wrongful death and loss of consortium claims due to failure to comply with Rule 9(j).

2. Statute of Limitations

[2] In addition to dismissing the wrongful death and loss of consortium claims under Rule 9(j), the trial court determined the claims were also barred by the applicable statute of limitations. N.C. Gen. Stat. § 1-53(4) (2015). Plaintiffs have not challenged the trial court's dismissal based upon expiration of the applicable statute of limitations. Any argument challenging the trial court's dismissal of those claims based upon the statute of limitations is abandoned. N.C. R. App. P. 28(b)(6). The trial court's unchallenged dismissal of the wrongful death and loss of consortium actions under Rule 12(b)(6) for failure to file the claims within the statute of limitations remains undisturbed.

C. Negligence and Negligent Infliction of Emotional Distress

[3] Plaintiffs argue the negligence and negligent infliction of emotional distress claims are not "medical malpractice" claims and do not require a Rule 9(j) certification. Plaintiffs argue those claims are related to "how [Mr. Norton] was prevented from seeing his family as he was dying and the unauthorized autopsy and the displacement of [Mr. Norton's] organs."

Regardless of whether those claims require a Rule 9(j) certification, Plaintiffs failed to challenge the trial court's dismissal of these negligence claims pursuant to Rule 12(b)(6) for failure to state a claim. Any argument challenging the trial court's dismissal of those claims under Rule 12(b)(6) is abandoned. N.C. R. App. P. 28(b)(6). The trial court's unchallenged dismissal of those causes of actions under Rule 12(b)(6) remains undisturbed.

D. Intentional Infliction of Emotional Distress ("IIED")

Plaintiffs challenge the trial court's dismissal of the IIED claims against the defendants under both Rules 9(j) and 12(b)(6).

To state a claim for intentional infliction of emotional distress, a plaintiff must allege: "(1) extreme and outrageous conduct (2) which is intended to cause and does cause (3) severe emotional distress to another." *Dickens v. Puryear*, 302 N.C. 437, 452, 276 S.E.2d 325, 335 (1981). Extreme and outrageous conduct is defined as conduct that is "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Smith-Price v. Charter Behavioral Health Sys.*, 164 N.C. App. 349, 354, 595 S.E.2d 778, 782 (2004) (citation omitted).

Our appellate courts have "set a high threshold for finding that conduct meets the standard." *Dobson v. Harris*, 134 N.C. App. 573, 578, 521 S.E.2d 710, 715 (1999), *rev'd on other grounds*, 352 N.C. 77, 530 S.E.2d 829 (2000).

> This tort imports an act which is done with the intention of causing emotional distress or with reckless indifference to the likelihood that emotional distress may result. A defendant is liable for this tort when he desires to inflict severe emotional distress or *knows that such distress is certain, or substantially certain, to result from his conduct* or where he acts recklessly in deliberate disregard of a high degree of probability that the emotinal [sic] distress will follow and the mental distress does in fact result.

Dickens, 302 N.C. at 449, 276 S.E.2d at 333 (citations, quotations, and ellipsis omitted) (emphasis supplied).

"[T]he initial determination of whether conduct is extreme and outrageous is a question of law for the court: 'If the court determines that it may reasonably be so regarded, then it is for the jury to decide whether, under the facts of a particular case, defendants' conduct . . . was in fact extreme and outrageous.' " *Johnson v. Bollinger*, 86 N.C. App. 1, 6, 356 S.E.2d 378, 381-82 (1987) (quoting *Briggs v. Rosenthal*, 73 N.C. App. 672, 676, 327 S.E.2d 308, 311 (1985)).

1. Scotland Memorial

a. Rule 9(j) Requirement

[4] Plaintiffs argue a Rule 9(j) certification was not required for this claim, because the allegations do not involve an injury to Mr. Norton or concern his medical treatment or death. Instead, the injuries to Plaintiffs stem from Scotland Memorial staff's failure and refusal to allow Mrs. Norton and her children to see their husband and father as he was crying out in distress prior to his death. We agree.

Plaintiff's complaint alleges:

> 10. There were several times that Mr. Norton screamed and cried out for his wife and children to come back with him.
>
> 11. The staff at Scotland refused to allow Mr. Norton's family to see him. His cries were so loud and adamant that visitors in the waiting area commented on it.

> 12. At one point, Jessie Norton advised the hospital staff that she had waited an excessive amount of time to see her husband and she wanted to see him. At that point, staff members came and sat beside her and refused to let her see her husband.
>
> . . . .
>
> 23. The frustration regarding not being about [sic] to be there for Mr. Norton has haunted his family, causing emotional distress that has occasionally manifested into physical symptoms.

The complaint further alleges Mr. Norton was thereafter removed from the ventilator without his or Mrs. Norton's consent and died.

As discussed above, a Rule 9(j) certification is required in a "medical malpractice" action, which is defined as "a civil action for damages for personal injury or death arising out of the health care provider's furnishing or failure to furnish professional services," or "breach of an administrative or corporate dut[y] to the patient." N.C. Gen. Stat. § 90-21.11(2).

The allegations against Scotland Memorial regarding the staff's refusal to allow Mrs. Norton and her children to see Mr. Norton as he was distressed and crying out for them prior to the unconsented removal of the ventilator occurred while Scotland Memorial rendered medical services to Mr. Norton. Plaintiffs' claims for IIED against Scotland Memorial do not seek damages arising from allegations of Mr. Norton's "personal injury or death." *Id.* The damages claimed by Plaintiffs are not damages sustained by Mr. Norton. Rather, Plaintiffs, Mr. Norton's wife and children, claim they sustained emotional damage by hearing Mr. Norton call out to them prior to his death, and from being prevented from seeing him, coupled with the unconsented to removal of the ventilator. These unique and specific factual allegations do not fall under the plain language of Rule 9(j) to require a medical expert's certification. *Id.*

b. Rule 12(b)(6) Dismissal

"A complaint should not be dismissed under Rule 12(b)(6) 'unless it affirmatively appears that plaintiff is entitled to no *relief under any state of facts which could be presented in support of the claim*.' " *Ladd v. Estate of Kellenberger*, 314 N.C. 477, 481, 334 S.E.2d 751, 755 (1985) (quoting *Presnell v. Pell*, 298 N.C. 715, 719, 260 S.E.2d 611, 613 (1979)) (emphasis supplied). "The system of notice pleading affords a sufficiently liberal construction of complaints so that few fail to survive a motion to dismiss." *Id.* "Such simplified notice pleading is made possible

by the liberal opportunity for discovery and the other pretrial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues." *Pyco Supply Co., Inc. v. American Centennial Ins. Co.*, 321 N.C. 435, 442-43, 364 S.E.2d 380, 384 (1988) (citation omitted).

Under the notice pleading standard, the face of Plaintiffs' complaint does not reveal an insurmountable bar to recovery on the allegations of IIED against Scotland Memorial for us to sustain the dismissal under Rule 12(b)(6). The allegations and circumstances surrounding Scotland Memorial's refusal to allow Mr. Norton's family to see him, and the hospital's reasonableness and justification, or lack thereof, and the consequences to the family are issues "for discovery and the other pretrial procedures." *Id.* at 444, 364 S.E.2d at 384.

Plaintiffs' IIED claims may later be determined to be insufficient to go to the jury, but that issue is not before us. Based solely upon the allegations on the face of their complaint, Plaintiffs should be provided the opportunity, afforded by the Rules of Civil Procedure, to discover and "to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues." *Id.* The trial court's dismissal under Rule 12(b)(6) of Plaintiff's IIED allegation against Scotland Memorial was premature, and is reversed.

2. Duke Hospital

a. Rule 9(j) Requirement

[5] Plaintiffs' complaint alleges Mr. Norton was admitted as a patient and treated at Scotland Memorial, and "at some point, Mr. Norton was transferred to Duke." The complaint alleges:

> 15. Duke asked Mrs. Norton if she wanted an autopsy for Mr. Norton and she responded in the affirmative.
>
> 16. Mrs. Norton was asked on multiple occasions if she wanted an autopsy.
>
> 17. Mrs. Norton asked Duke if they would avoid cutting Mr. Norton's head open. This was an issue that she and Mr. Norton had discussed. This was an important issue to him.
>
> 18. Mrs. Norton was informed by Duke that they had to open his head because it was ordered by Scotland.
>
> 19. Mr. Norton had been an organ donor. However, when he renewed his most recent driver's license, he declined

> to be an organ donor. This was an important issue that he had addressed with his wife prior to his death.
>
> 20. At some point, Mr. Norton's previous driver's license was taken, not the most recent driver's license that indicated that he would not agree to be an organ donor.
>
> 21. When Mr. Norton's body arrived at the funeral home, his organs had been removed and were never returned.
>
> 22. Mrs. Norton was dealt with rudely as she sought to locate her husband's organs and eyes.
>
> . . . .
>
> 24. The misappropriation of Mr. Norton's organs has also created frustration, additional grief and emotional distress for his family.

Plaintiffs' claims against Duke Hospital pertain to alleged actions by Scotland Memorial and Duke Hospital after Mr. Norton's death, and do not involve the provision of medical care under N.C. Gen. Stat. § 90-21.11. A medical expert's certification under Rule 9(j) was not required to validate Plaintiffs' IIED claim against Duke Hospital, after Mr. Norton was deceased and the allegations against Duke Hospital pertain to the autopsy and removal of organs. *See Bennett v. Hospice & Palliative Care Ctr. of Alamance-Caswell*, __ N.C. App. __, 783 S.E.2d 260 (2016) (holding claims which occurred subsequent to the decedent's death, mishandling the body and failure to provide bereavement services, did not involve the provision of medical care to require a Rule 9(j) certification).

b. Rule 12(b)(6) Dismissal

Regardless of whether a Rule 9(j) certification was required for Plaintiffs' claim against Duke Hospital, Plaintiffs failed to state and plead sufficient facts to allege extreme and outrageous conduct by Duke Hospital or its staff. Accepting Plaintiffs' factual allegations against Duke Hospital as true and in the light most favorable to Plaintiffs with the benefit of every reasonable inference, the complaint indicates the autopsy was ordered by Scotland Memorial. Mrs. Norton was asked to consent and authorized Duke Hospital to perform an autopsy, but requested Duke Hospital to refrain from cutting Mr. Norton's head. Duke Hospital informed Mrs. Norton that such a procedure would be required under Scotland Memorial's order. The complaint does not indicate or assert whether Mrs. Norton then attempted to limit or prevent the

autopsy, or whether Mr. Norton's head was in fact cut during the course of the autopsy. The complaint does not allege whether Duke Hospital performed the autopsy, and only describes Mrs. Norton's conversation with Duke Hospital staff, when she consented to the autopsy.

Plaintiffs also allege Mr. Norton's organs were removed, even though his most recent driver's license indicated he did not consent to organ donation. Taking Plaintiffs' allegations as true, the complaint indicates Duke Hospital was in possession of Mr. Norton's previous driver's license, which indicated he had agreed to be an organ donor, and not his most recent driver's license, which did not so indicate.

> Our law recognizes that the next of kin has a quasi-property right in the body – not property in the commercial sense but a right of possession for the purpose of burial – and that there arises out of this relationship to the body an emotional interest which should be protected and which others have a duty not to injure intentionally or negligently . . . . Furthermore, the survivor has the legal right to bury the body as it was when life became extinct. *Kyles v. R. R.*, *supra* [147 N.C. 394, 61 S.E. 278]. For any mutilation of a dead body the one entitled to its custody may recover compensatory damages for his mental suffering caused thereby if the mutilation was either intentionally or negligently committed, *Morrow v. R. R.*, 213 N.C. 127, 195 S.E. 383, *or was done by an unlawful autopsy*. If defendant's conduct was wilful or wanton, actually malicious, or grossly negligent, punitive damages may also be recovered. *Kyles v. R. R.*, *supra*."

Parker v. Quinn-McGowen Co., 262 N.C. 560, 561-62, 138 S.E.2d 214, 215-16 (1964) (emphasis supplied).

The complaint fails to allege whether Duke Hospital knew or should have known about Mr. Norton's change in status as an organ donor, or whether Duke Hospital intentionally disregarded his status as an organ donor. Plaintiffs' have failed to allege facts to show Duke Hospital acted with intention to cause emotional distress or with reckless indifference to the likelihood that emotional distress may result, or "kn[ew] that such distress is certain, or substantially certain, to result. *Dickens*, 302 N.C. at 449, 276 S.E.2d at 333. Plaintiffs' complaint does not indicate the conduct by Duke Hospital staff in performing the autopsy with Mrs. Norton's consent and the handling of Mr. Norton's organs was "beyond all possible bounds of decency, . . . atrocious, and utterly intolerable in

a civilized community." *Smith-Price*, 164 N.C. App. at 354, 595 S.E.2d at 782. *See Hardin v. York Mem'l Park*, 221 N.C. App. 317, 327, 730 S.E.2d 768, 777 (holding children of deceased parents failed to sufficiently plead extreme and outrageous conduct to support IIED claim against cemetery, where cemetery sold family burial plots to third parties and their mother was unable to be buried next to their father), *disc. review denied*, 366 N.C. 571, 738 S.E.2d 376 (2012). The trial court properly dismissed Plaintiffs' IIED claim against Duke Hospital. Plaintiffs' arguments are overruled.

IV. Conclusion

Even were we to presume a Rule 9(j) certification is not required for some or all of the claims Plaintiffs raised in their complaint, the trial court's Rule 12(b)(6) dismissal of all claims, except the intentional infliction of emotion distress claim, is unchallenged and remains undisturbed. The trial court's Rule 12(b)(6) dismissal of Plaintiffs' IIED claim against Scotland Memorial was premature, and is reversed. The trial court did not err in dismissing the IIED claim against Duke Hospital under Rule 12(b)(6). The trial court's order is affirmed in part, reversed in part, and remanded.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED.

Chief Judge MCGEE and Judge DIETZ concur.

SERGEEF v. SERGEEF

[250 N.C. App. 404 (2016)]

EMMANUEL SERGEEF, PLAINTIFF
v.
TRANG SERGEEF, DEFENDANT

No. COA16-489

Filed 15 November 2016

1. Child Custody and Support—child support—calculation—tax returns

The trial court did not err by its calculation of defendant mother's income for purposes of calculating her child support obligations. Although plaintiff dad proffered an alternative income computation model, the trial court chose to give greater weight to the information contained in defendant's tax returns.

2. Child Custody and Support—retroactive child support—calculation—extraordinary expenses

The trial court erred by failing to follow the North Carolina Child Support Guidelines when computing defendant mom's child support obligation to plaintiff dad. The trial court failed to enter the basic child support obligation required by line item 4. Further, the trial court's order regarding the minor son's extraordinary expenses was vacated and remanded to the trial court to make additional findings of fact and to recalculate the amount of retroactive child support in light of its additional findings.

3. Child Custody and Support—retroactive child support—findings of fact—shared custody

The trial court erred in a child support case by its finding of fact that since August 2013, the parties have shared custody of their minor daughter equally. This portion of the order was remanded to the trial court for the limited purpose of recalculating the amount of retroactive child support plaintiff dad was entitled to recover from defendant mother.

Appeal by Plaintiff from order entered 23 November 2015 by Judge Robin W. Robinson in New Hanover County District Court. Heard in the Court of Appeals 5 October 2016.

J. Albert Clyburn for Plaintiff-Appellant.

No brief filed for Defendant-Appellee.

ENOCHS, Judge.

Emmanuel Sergeef ("Plaintiff") appeals from the trial court's 23 November 2015 child support order. After careful review, we affirm in part, reverse in part, vacate in part, and remand.

Factual Background

Plaintiff and Defendant were married on 22 July 2009. The parties are the parents of one minor child, Melissa.[1] The Defendant has one other biological child, Henry, from a previous relationship. The parties separated on 31 December 2012 and divorced on 1 August 2014. Defendant is self-employed and owns a nail salon business in Wilmington, North Carolina. Plaintiff has several sources of income, including carpentry and photography.

On 26 July 2013, Plaintiff filed a complaint in New Hanover County District Court seeking an emergency custody order for the parties' minor child Melissa on the ground that Defendant had engaged in a physical altercation with her minor son, Henry, resulting in intervention by the New Hanover County Department of Social Services and the filing of child abuse charges against her. On 3 September 2013, the Honorable J.H. Corpening, II entered an order granting Plaintiff temporary care, custody, and control of both Melissa and Henry.

On 3 December 2013, Plaintiff filed a motion in the cause seeking prospective child support, and on 9 December 2013 he filed an amended motion seeking retroactive child support as well. Defendant filed an answer and counterclaims for (1) custody of Melissa and Henry; (2) child support; and (3) absolute divorce.

On 2 July 2014, a hearing was held to determine custody of the minor children. That same day, the trial court entered a consent order providing that the parties would have joint legal and physical custody of Melissa, and that Henry would remain in Plaintiff's custody during the pendency of Defendant's probationary period related to the child abuse charges stemming from her altercation with Henry, after which time Henry would decide whether to reside with Plaintiff or Defendant. The order also reflected that the parties had agreed that child support would be calculated pursuant to the North Carolina Child Support Guidelines.

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1. Pseudonyms are used throughout this opinion to protect the identity of the minor children.

A child support hearing was subsequently held before the Honorable Robin W. Robinson in New Hanover County District Court on 21 and 22 May 2015. At the hearing, Plaintiff submitted a two-step valuation model for determining Defendant's gross income for child support calculation purposes. The first component entailed a purported computation of Defendant's gross income by subtracting Defendant's business and rental expenses from her alleged gross revenue. The second sought to corroborate the first by presenting evidence of Defendant's personal expenditures as reflected in various banking records and a financial standing affidavit allegedly prepared and signed by Defendant, although Defendant denied ever signing this document at the hearing and maintained that the signature on the affidavit was a forgery. Plaintiff's model arrived at an estimated gross annual income for Defendant of $132,388.00.

Defendant, in turn, admitted into evidence her tax returns reflecting that her income was a substantially lesser amount than the $132,388.00 amount arrived at by Plaintiff. Defendant's 2013 tax returns reflected a gross income of $30,749.00 and her 2014 returns indicated a gross income of $23,666.00. Plaintiff's and Defendant's joint 2012 tax return reflected a combined gross income of $30,092.00.

On 23 November 2015, the trial court entered a child support order. The order adopted the gross income amount for Defendant as set forth in the tax return evidence introduced by Defendant at the hearing. Based on this information and the child support worksheets prepared by Defendant, the trial court determined that (1) Defendant did not owe any retroactive child support arrears to Plaintiff; and (2) beginning from 1 August 2015 forward, Defendant would pay $101.26 per month in child support to Plaintiff. On 18 December 2015, Plaintiff filed notice of appeal of the trial court's 23 November 2015 child support order.

Analysis

It is well established that " '[c]hild support orders entered by a trial court are accorded substantial deference by appellate courts and our review is limited to a determination of whether there was a clear abuse of discretion.' " *Trevillian v. Trevillian*, 164 N.C. App. 223, 226, 595 S.E.2d 206, 208 (2004) (quoting *Mason v. Erwin*, 157 N.C. App. 284, 287, 579 S.E.2d 120, 122 (2003)). "This Court's review is limited to a consideration of whether there is sufficient competent evidence to support the findings of fact, and whether, based on these findings, the Court properly computed the child support obligations." *Miller v. Miller*, 153 N.C. App. 40, 47, 568 S.E.2d 914, 918-19 (2002). Furthermore, "[e]videntiary issues concerning credibility, contradictions, and discrepancies are for the trial court — as the fact-finder — to resolve and, therefore, the trial court's

findings of fact are conclusive on appeal if there is competent evidence to support them despite the existence of evidence that might support a contrary finding." *Smallwood v. Smallwood*, ___ N.C. App. ___, ___, 742 S.E.2d 814, 817 (2013); *see Shipman v. Shipman*, 357 N.C. 471, 474-75, 586 S.E.2d 250, 253-54 (2003) ("Our trial courts are vested with broad discretion in child custody matters. This discretion is based upon the trial courts' opportunity to see the parties; to hear the witnesses; and to detect tenors, tones, and flavors that are lost in the bare printed record read months later by appellate judges. Accordingly, should we conclude that there is substantial evidence in the record to support the trial court's findings of fact, such findings are conclusive on appeal, even if record evidence might sustain findings to the contrary." (internal citations and quotation marks omitted)); *see also Wiseman Mortuary, Inc. v. Burrell*, 185 N.C. App. 693, 697, 649 S.E.2d 439, 442 (2007) (" 'Findings of fact are conclusive if supported by competent evidence, irrespective of evidence to the contrary.' " (quoting *Oliver v. Bynum*, 163 N.C. App. 166, 169, 592 S.E.2d 707, 710 (2004))).

I. Valuation of Defendant's Income

[1] Plaintiff's first argument on appeal is that the trial court erroneously calculated Defendant's income for purposes of calculating her child support obligations. Specifically, he contends that the trial court should have utilized his valuation method instead of relying on the information contained in Defendant's tax returns. We cannot agree.

Here, evidence was presented at the hearing as to Defendant's gross income based on the information reflected in her tax returns. Tax returns have long been consistently relied upon by North Carolina courts as constituting competent evidence of a self-employed individual's income. *See Kelly v. Kelly*, 228 N.C. App. 600, 608, 747 S.E.2d 268, 277 (2013) (in alimony modification action "the actual numbers presented to the trial court in the income tax returns of the defendant and his law firm support the trial court's finding that defendant's income has fluctuated but not decreased substantially. Defendant may disagree with the trial court's finding that any decreases in the two most recent years in his income have not been 'substantial' and that his business has not changed in a material way, but the trial court clearly considered the evidence, weighed its credibility, and made appropriate findings based on the evidence. This Court cannot substitute its judgment for that of the trial court in this situation"); *see also*, *e.g.*, *Hill v. Sanderson*, ___ N.C. App. ___, ___, 781 S.E.2d 29, 37 (2015); *Robinson v. Robinson*, 210 N.C. App. 319, 327, 707 S.E.2d 785, 792 (2011); *Squires v. Squires*, 178 N.C. App. 251, 257, 631 S.E.2d 156, 159 (2006); *Long v. Long*,

71 N.C. App. 405, 408, 322 S.E.2d 427, 430 (1984); *Whitley v. Whitley*, 46 N.C. App. 810, 811, 266 S.E.2d 23, 24 (1980).

While Plaintiff proffers an alternative income computation model based upon evidence he has compiled from information contained in Defendant's various banking records, the trial court chose to give greater weight to the information contained in Defendant's tax returns. We will not disturb a trial court's findings based upon competent evidence, even where other evidence may tend to support a contrary result. The trial court is in the best position to weight and consider the evidence and the testimony of witnesses at trial. As a result, we hold that competent evidence existed to support the trial court's findings of fact as to Defendant's income. Plaintiff's arguments on this issue are consequently overruled.

II. Computation of Defendant's Child Support Obligations

A. Retroactive Child Support Obligation for Henry

[2] Plaintiff contends that the trial court failed to follow the North Carolina Child Support Guidelines when computing Defendant's child support obligation to Plaintiff. We agree. The trial court correctly utilized worksheet A to compute Defendant's obligation, but failed to enter the basic child support obligation required by line item 4.

Plaintiff next contends that there was insufficient evidence in the record supporting its finding that "During the time that [Henry] was in the care of Plaintiff, Defendant paid for extraordinary expenses including her son's tuition at Wilmington Christian Academy which averaged $627.00 per month, out of pocket medical and dental expenses, shoes and clothing, cell phone bill and gave him spending money." After a thorough review of the record and transcript, we vacate this portion of the trial court's order and remand for additional findings.

While we note that Defendant's "Worksheet A Child Support Obligation Primary Custody" denotes a $627.00 amount under "[e]xtraordinary expense[s]" which is equivalent to the amount found by the trial court to be for Henry's private school expenses, the worksheet does not actually state that this is what the $627.00 amount pertains to. Additionally, nowhere else in the record on appeal is there any other evidence that Defendant paid for Henry's schooling during the applicable time period.

While it may be the case that this amount is, in fact, reflective of the amount paid by Defendant for Henry's education, the trial court did not expressly state in its findings that the $627.00 amount reflected in the child support worksheet was what it was relying upon in making this

finding. As a result, we vacate this portion of the trial court's order and remand to the trial court to make additional findings of fact on this issue. *See Hampton v. Hampton*, 29 N.C. App. 342, 344, 224 S.E.2d 197, 199 (1976) (" '[W]hen the court fails to find facts so that this Court can determine that the order is adequately supported by competent evidence . . . then the order entered thereon must be vacated and the case remanded for detailed findings of fact.' " (quoting *Crosby v. Crosby*, 272 N.C. 235, 238-39, 158 S.E.2d 77, 80 (1967))); *See Vadala v. Vadala*, 145 N.C. App. 478, 480, 550 S.E.2d 536, 538 (2001) (remanding for further findings of fact when trial court made finding as to amount of plaintiff's income, but gave "no indication as to how [plaintiff's income] was calculated" and this Court, therefore, could not "confirm or deny this finding").

Additionally, because the trial court's additional findings on remand may potentially impact the amount of retroactive child support owed, we direct the trial court to recalculate the amount of retroactive child support in light of its additional findings. *See Kowalick v. Kowalick*, 129 N.C. App. 781, 788, 501 S.E.2d 671, 676 (1998) ("We therefore remand for entry of findings on this issue, and for recalculation of the amount of Defendant's child support obligation if necessary.").

B. Retroactive Child Support Obligation for Melissa

[3] Plaintiff's final argument on appeal is that the trial court's finding that the parties had joint custody of Melissa from August 2013 through December 2013 was not based upon competent evidence. In support of his position, Plaintiff directs us to the following testimony of Defendant at the hearing:

> Q. All right. Now, let's talk about 2013. Can we agree, factually, that, on July 18, 2013, both of your children were placed in the custody of Mr. Sergeef?
>
> A. Yes.
>
> Q. All right. And can we agree that, for the balance of 2013, both of your children were in the physical legal custody of Mr. Sergeef?
>
> A. Yes.

Based on this exchange and the absence of any evidence to the contrary, we agree with Plaintiff that the trial court's finding of fact that "[s]ince August 2013, the parties have shared custody of their minor child, [Melissa], equally" is unsupported by the evidence. This, in turn, directly impacts the trial court's conclusion of law that "Defendant has

paid adequate support based on the North Carolina Child Support Guidelines and owes no arrears."

As discussed above, " 'when the court fails to find facts so that this Court can determine that the order is adequately supported by competent evidence . . . then the order entered thereon must be vacated and the case remanded for detailed findings of fact.' " *Hampton*, 29 N.C. App. at 344, 224 S.E.2d at 199 (quoting *Crosby*, 272 N.C. at 238-39, 158 S.E.2d at 80); *see also State ex rel. Fisher v. Lukinoff*, 131 N.C. App. 642, 649, 507 S.E.2d 591, 596 (1998) (reversing and remanding case for additional findings where findings were insufficient to support conclusion of law but "ample evidence" existed in record to support such additional findings as would ultimately support conclusion of law). "However, if there is no competent evidence to support a finding of fact, an exception to the finding must be sustained and a judgment or order predicated upon such erroneous findings must be reversed." *Bridges v. Bridges*, 85 N.C. App. 524, 526, 355 S.E.2d 230, 231 (1987).

In *Biggs v. Greer*, 136 N.C. App. 294, 305-06, 524 S.E.2d 577, 585-86 (2000), this Court found no competent evidence in the record to support the trial court's findings of fact in its child support modification order in support of its conclusion of law that there had been a material change in circumstances warranting a modification of an existing child support order. We reversed that portion of the trial court's order, but declined to remand the issue for additional findings to be made by the trial court. *Id.* at 306, 524 S.E.2d at 586.

In doing so, this Court distinguished previous cases in which we reversed and remanded for additional findings of fact where the trial court's findings were insufficient to support its conclusions of law but competent evidence in the record would have supported additional findings that would then, in turn, have ultimately supported those conclusions of law, holding as follows:

> The findings in the [child support order] were thus insufficient to support the trial court's conclusion therein that "there ha[d] been a substantial and material change in circumstances warranting a modification" of the existing child support order.
>
> In such circumstance, we have on an earlier occasion reversed the trial court's order and remanded the matter for further findings relative to retroactive child support. In the case sub judice, however, *the instant record reflects no competent evidence sufficient to support findings sustaining the conclusion of law*. . . .

> . . . We therefore decline to remand this matter for additional findings regarding the trial court's order of retroactive child support, but instead simply reverse that award.

Id. at 305-06, 524 S.E.2d at 586 (emphasis added) (internal citations omitted); *see Harnett Cnty. ex rel. De la Rosa v. De la Rosa*, ___ N.C. App. ___, ___, 770 S.E.2d 106, 113-14 (2015) ("In some cases, we may remand a case to the trial court to make additional findings of fact based upon the evidence presented, but here, the lack of findings is due to the lack of evidence itself. . . . We therefore reverse[.]").

Consequently, in light of this Court's decision in *Biggs*, we reverse the portion of the trial court's order concluding that no retroactive child support was owed by Defendant to Plaintiff pertaining to its erroneous finding that the parties shared joint custody of Melissa from August through the end of the 2013 calendar year where all of the evidence unambiguously demonstrated that Melissa was in Plaintiff's sole custody during that time period. We do, however, remand this portion of the order to the trial court for the limited purpose of recalculating the amount of retroactive child support Plaintiff is entitled to recover from Defendant in light of our holding.

Conclusion

For the reasons stated above, the portion of the trial court's order pertaining to the valuation of Defendant's income is affirmed. The portion of the order concerning the amount of retroactive child support owed by Defendant pertaining to Henry is vacated and we remand for additional findings of fact and recalculation of the amount of retroactive child support — if any — owed. The portions of the order based upon the finding that Melissa was in the joint custody of both Plaintiff and Defendant from August through the end of the 2013 calendar year is reversed and remanded to the trial court for the limited purpose of recalculating the amount of retroactive child support owed.[2]

AFFIRMED IN PART; REVERSED IN PART; VACATED IN PART; AND REMANDED.

Judges DAVIS and INMAN concur.

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2. We also note that Defendant utilized an outdated version of the child support worksheets. On remand, we direct the trial court to ensure that the most recent version of the worksheets are used.

STATE v. FAULKNER

[250 N.C. App. 412 (2016)]

STATE OF NORTH CAROLINA, PLAINTIFF
v.
CHARLES DREW FAULKNER, DEFENDANT

No. COA16-319

Filed 15 November 2016

Constitutional Law—effective assistance of counsel—knowing, intelligent, and voluntary waiver

The trial court did not err by allowing defendant to represent himself at a probation revocation hearing allegedly without making a valid determination that defendant's decision to proceed pro se was knowing, intelligent, and voluntary. The trial court properly conducted the inquiry required under N.C.G.S. § 15A-1242.

Appeal by defendant from judgment entered 16 October 2015 by Judge W. Osmond Smith, III in Person County Superior Court. Heard in the Court of Appeals 6 October 2016.

Attorney General Roy Cooper, by Assistant Attorney General Christine Wright, for the State.

Patterson Harkavy LLP, by Paul E. Smith, for defendant-appellant.

ZACHARY, Judge.

Charles Drew Faulkner (defendant) appeals from judgments revoking his probation and activating the corresponding sentences that were imposed upon his convictions of criminal offenses in 2013 and 2014. Defendant argues on appeal that the trial court erred by allowing him to represent himself without first determining that his request to proceed *pro se* was knowing and voluntary. We conclude that the trial court properly conducted the inquiry required under N.C. Gen. Stat. § 15A-1242 (2015), and thus did not err by allowing defendant to represent himself at the probation revocation hearing.

I. Factual and Procedural History

On 14 August 2013, defendant pleaded guilty to the sale of marijuana, possession of marijuana with intent to sell or deliver, possession of drug paraphernalia, and possession of a firearm by a convicted felon. The drug-related charges were consolidated and defendant was sentenced to a term of 10-21 months' imprisonment; the sentence was suspended

and defendant was placed on supervised probation for 24 months. Defendant received a consecutive suspended sentence of 17-30 months' imprisonment for possession of a firearm by a felon.[1] On 20 November 2014, defendant pleaded guilty to possession of marijuana with intent to sell or deliver, possession of drug paraphernalia, and maintenance of a dwelling for the purpose of selling marijuana. The court imposed two consecutive sentences of 6-17 months imprisonment, which were suspended, and defendant was placed on probation for a period of 36 months.

On 19 May 2015, defendant's probation officer filed violation reports alleging violations by defendant of the terms of the probationary sentences imposed in 2013, including his commission of the offenses to which he pleaded guilty in 2014, and being in arrears on court-ordered payments. It was also alleged that defendant had violated the terms of the 2014 probationary sentences in several respects, including having tested positive for the presence of marijuana. On 8 June 2015, defendant appeared in court on the charges of violating the terms of his probation. The trial court informed defendant that if he were indigent he would qualify for court-appointed counsel and that he also could hire an attorney or represent himself. After discussing the issue with defendant, the trial court granted defendant's request to represent himself with the assistance of standby counsel.

On 30 August 2015, the trial court conducted a probation revocation hearing. Defendant, who appeared *pro se*, did not offer evidence or raise any arguments pertaining to the substantive merits of the probation violation reports. Instead, defendant relied solely on the argument that he was a "Moorish National" or "sovereign citizen" and therefore was not subject to the court's jurisdiction. At the end of the hearing, the trial court found that defendant had violated the terms of his probation. The court activated the suspended sentences previously imposed on defendant and consolidated the judgments into two consecutive sentences of 14 - 26 months' followed by 6 -17 months' imprisonment. Defendant gave oral notice of appeal.

II. Standard of Review

On appeal, defendant contends that the trial court erred by allowing him to represent himself without making a valid determination that

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1. Defendant later filed a motion for appropriate relief on the grounds that his prior record level was miscalculated in the judgment sentencing him for possession of a firearm by a felon. Defendant's motion was granted and he was resentenced to a term of 14-26 months' for possession of a firearm by a felon.

defendant's decision to proceed *pro se* was knowing, intelligent, and voluntary. We do not agree.

It is well-established that "[t]he right to counsel provided by the Sixth Amendment to the United States Constitution also provides the right to self-representation." *State v. White*, 349 N.C. 535, 563, 508 S.E.2d 253, 270-71 (1998) (citing *Faretta v. California*, 422 U.S. 806, 45 L. Ed. 2d 562 (1975), and N.C. Const. art. I, § 23). "Before allowing a defendant to waive in-court representation by counsel, however, the trial court must insure that constitutional and statutory standards are satisfied." *State v. Thomas*, 331 N.C. 671, 673, 417 S.E.2d 473, 475 (1992). "[I]t is error for a trial court to allow a criminal defendant to release his counsel and proceed *pro se* unless, first, the defendant expresses 'clearly and unequivocally' his election to proceed *pro se* and, second, the defendant knowingly, intelligently, and voluntarily waives his right to in-court representation." *White*, 349 N.C. at 563, 508 S.E.2d at 271 (citation omitted).

Under North Carolina law, " 'Once a defendant clearly and unequivocally states that he wants to proceed *pro se*, the trial court . . . must determine whether the defendant knowingly, intelligently, and voluntarily waives the right to . . . representation by counsel.' A trial court's inquiry will satisfy this constitutional requirement if conducted pursuant to N.C.G.S. § 15A-1242." *State v. Moore*, 362 N.C. 319, 322, 661 S.E.2d 722, 724 (2008) (quoting *Thomas*, 331 N.C. at 674, 417 S.E.2d at 476). N.C. Gen. Stat. § 15A-1242 provides as follows:

> A defendant may be permitted at his election to proceed in the trial of his case without the assistance of counsel only after the trial judge makes thorough inquiry and is satisfied that the defendant:
>
> (1) Has been clearly advised of his right to the assistance of counsel, including his right to the assignment of counsel when he is so entitled;
>
> (2) Understands and appreciates the consequences of this decision; and
>
> (3) Comprehends the nature of the charges and proceedings and the range of permissible punishments.

"We review a trial court's decision to permit a defendant to represent himself *de novo*." *State v. Garrison*, __ N.C. App. __, __, 788 S.E.2d 678, 679 (2016) (citing *State v. Watlington*, 216 N.C. App. 388, 393-94, 716 S.E.2d 671, 675 (2011)).

III. Discussion

Defendant argues that the trial court committed reversible error by allowing him to proceed *pro se* at the probation revocation hearing without first determining that defendant's decision was knowing, intelligent, and voluntary. Analysis of this issue is best understood by reviewing the colloquy between the trial court and defendant, which is set out below:

> PROSECUTOR: . . . Charles Drew Faulkner. It's on for a first appearance for his probation violation. Needs to be advised.
>
> DEFENDANT: For the record, let the record show I'm Charles Drew Faulkner. I'm Moorish American National.
>
> THE COURT: Please stand, sir. You're charged with violating probation. If you were to be found in violation, you could have probation revoked. Your suspended sentences are 10 to 21 months, 14 to 26 months, 6 to 17 months and 6 to 17 months. Those are the sentences you could possibly be required to serve if you were found in violation and subject to revocation. Because of that, you're entitled to be represented by a lawyer. If you desire a lawyer and cannot afford one, the Court will appoint a lawyer to represent you at no cost to you at this time. An appointed lawyer is not necessarily free, in that if you were to be found in violation of probation, one of the conditions of judgment would be that you be required to reimburse the State for the value of your court-appointed attorney's services. You have the right to represent yourself, retain a lawyer to represent you or to apply for a court-appointed lawyer. Do you understand those matters, sir?
>
> DEFENDANT: Yes, I understand.
>
> THE COURT: What do you want to do about a lawyer?
>
> DEFENDANT: Represent myself.
>
> THE COURT: All right. The law requires me to have additional discussion with you. Do you understand if you choose to represent yourself, that I may not serve as a legal adviser to you?
>
> DEFENDANT: I understand.

THE COURT: That you would be expected to know and follow the rules and procedures that would be applicable as if you had a lawyer. Do you understand that?

DEFENDANT: Yes.

THE COURT: At a probation violation hearing, the State's not required to prove violations beyond a reasonable doubt, but only to the reasonable satisfaction of a judge. Do you understand that?

DEFENDANT: Yes. Can you state your jurisdiction for the record?

THE COURT: Further, do you understand that there might be things about the law that you don't understand because you're not schooled in law? There might be things that you couldn't take advantage of that would be to your benefit if you knew about. If you choose to represent yourself, you are, in effect, understanding all the circumstances you have, you are knowing the consequences and you further understand there might be things about the law that you can't use to your benefit? Do you understand that?

DEFENDANT: I don't.

THE COURT: There may be things about the law and procedures in probation violations. If you don't know those things . . . there might be some rights that you would lose or waive or give up or not be able to take advantage of. Sometimes people even refer to them as technicalities. So do you understand that if you choose to represent yourself, and you don't know something about the law, then that's just the way you find yourself. Do you understand that?

DEFENDANT: No.

THE COURT: Do you have any questions about that?

DEFENDANT: No.

THE COURT: Do you want to represent yourself?

DEFENDANT: I would ask to have standby counsel.

THE COURT: You'd like to have standby counsel?

DEFENDANT: Yes.

THE COURT: Then do you understand if you choose to represent yourself, I'm required to have this conversation with you about your decision to be sure that you understand[.] . . . I don't have to decide whether it's a good decision, but that you understand your decision to represent yourself. So knowing all that you know about yourself, the circumstances that you find yourself in, the potential consequences, everything I've discussed with you and everything else that you know about your situation, you choose now to give up your rights to a lawyer and represent yourself, but you request standby counsel. Is that right?

DEFENDANT: Yes, sir.

THE COURT: All right. Have the defendant sign a waiver of all counsel. This is a document agreeing to what you just said to me.

. . .

THE COURT: The Court has complied with 15A-1242. The defendant should be allowed to represent himself as he has requested. Further, pursuant to 15A-1243, the defendant's request to have standby counsel appointed to assist him when called upon and to bring to the Judge's attention matters favorable to the defendant upon which the Judge should rule upon his own motion is granted. That is, defendant's request for standby counsel is granted.

. . .

DEFENDANT: Could you state your jurisdiction for the record, sir?

THE COURT: I think I understood your question. But would you say it a little slower and clearer?

DEFENDANT: Would you state your jurisdiction for the record, sir?

THE COURT: Yes, sir. I'm a Superior Court Judge.

DEFENDANT: I didn't ask what kind of judge you were.

THE COURT: You can move . . . on to the next case.

In the trial court's discussion with defendant, the court explained the "nature of the charges and proceedings and the range of permissible

punishments" and informed defendant of "his right to the assistance of counsel, including his right to the assignment of counsel when he is so entitled," as required by N.C. Gen. Stat. § 15A-1242. In response, defendant "clearly and unequivocally" asked to represent himself. The trial court then informed defendant that (1) if defendant represented himself, the trial court would not serve as a legal adviser to defendant; (2) if defendant proceeded *pro se* he would be expected to know and follow the rules and procedures of court; and (3) that at a probation violation hearing, the State is not required to prove violations beyond a reasonable doubt, but only to the reasonable satisfaction of the court. Defendant indicated that he understood each of these warnings regarding the consequences of representing himself. We conclude that the trial court's inquiry of defendant met the standard set out in N.C. Gen. Stat. § 15A-1242 and that the trial court did not err by allowing defendant to proceed *pro se*.

We note that this conclusion is also supported by our jurisprudence interpreting N.C. Gen. Stat. § 7A-457 (a) (2015), which provides in relevant part that:

> An indigent person who has been informed of his right to be represented by counsel . . . may, in writing, waive the right to in-court representation by counsel[.] . . . Any waiver of counsel shall be effective only if the court finds of record that at the time of waiver the indigent person acted with full awareness of his rights and of the consequences of the waiver. In making such a finding, the court shall consider, among other things, such matters as the person's age, education, familiarity with the English language, mental condition, and the complexity of the crime charged.

N.C. Gen. Stat. § 7A-457 requires the trial court to find "that at the time of waiver, the defendant acted with full awareness of his rights and of the consequences of the waiver. . . . This is similar to the inquiry required under N.C.G.S. § 15A-1242 and may be satisfied in a like manner." *State v. Heatwole*, 344 N.C. 1, 18, 473 S.E.2d 310, 318 (1996). Accordingly, in determining whether the trial court properly allowed defendant to represent himself, it is appropriate to consider the defendant's "age, education, familiarity with the English language, mental condition, and the complexity of the crime charged" as set out in N.C. Gen. Stat. § 7A-457. In this case, the record indicates that defendant was 23 years old, spoke English, had a G.E.D. degree, had attended college for one semester, and had no mental defects of record. In addition, there were no factual or legal complexities involved in the determination of

whether defendant had violated his probation. The alleged violations -- defendant's conviction of other offenses while on probation, testing positive for the presence of marijuana, and being in arrears on court-ordered payments -- were easily established by means of the official records of the defendant's 2014 convictions and the testimony of defendant's probation officer. Moreover:

> "A proceeding to revoke probation [is] often regarded as informal or summary, and the court is not bound by strict rules of evidence. An alleged violation by a defendant of a condition upon which his sentence is suspended need not be proven beyond a reasonable doubt. All that is required is that the evidence be such as to reasonably satisfy the judge in the exercise of his sound discretion that the defendant has violated a valid condition upon which the sentence was suspended. The findings of the judge, if supported by competent evidence, and his judgment based thereon are not reviewable on appeal, unless there is a manifest abuse of discretion."

State v. Williams, 230 N.C. App. 590, 597, 754 S.E.2d 826, 830 (2013) (quoting *State v. Tennant*, 141 N.C. App. 524, 526, 540 S.E.2d 807, 808 (2000)), *disc. review denied*, 367 N.C. 298, 753 S.E.2d 670 (2014). As a result of the relative informality of and the lower burden of proof at a probation revocation hearing, defendant's decision to represent himself did not require defendant to navigate complex evidentiary or procedural rules. We conclude that the inquiry conducted by the trial court in this case complied with N.C. Gen. Stat. § 15A-1242, that the factors set out in N.C. Gen. Stat. § 7A-457 also support the court's decision, and that the trial court did not err by allowing defendant to represent himself.

Defendant's argument for a contrary result is primarily based upon the fact that during his colloquy with the trial court, defendant twice indicated that he did not understand a statement by the trial court. The relevant excerpt from the transcript is as follows:

> THE COURT: At a probation violation hearing, the State's not required to prove violations beyond a reasonable doubt, but only to the reasonable satisfaction of a judge. Do you understand that?
>
> DEFENDANT: Yes. Can you state your jurisdiction for the record?
>
> THE COURT: Further, do you understand that there might be things about the law that you don't understand because

> you're not schooled in law? There might be things that you couldn't take advantage of that would be to your benefit if you knew about. If you choose to represent yourself, you are, in effect, understanding all the circumstances you have, you are knowing the consequences and you further understand there might be things about the law that you can't use to your benefit? Do you understand that?
>
> DEFENDANT: I don't.
>
> THE COURT: There may be things about the law and procedures in probation violations. If you don't know those things . . . there might be some rights that you would lose or waive or give up or not be able to take advantage of. Sometimes people even refer to them as technicalities. So do you understand that if you choose to represent yourself, and you don't know something about the law, then that's just the way you find yourself. Do you understand that?
>
> DEFENDANT: No.
>
> THE COURT: Do you have any questions about that?
>
> DEFENDANT: No.

Defendant contends on appeal that because he twice indicated that he did not understand a statement by the trial court, the trial court's determination that defendant's waiver of counsel was knowing, intelligent, and voluntary was erroneous. We conclude that defendant's argument lacks merit.

First, the statements about which defendant indicated confusion were not essential to the trial court's inquiry. The two questions to which defendant answered "No" when he was asked whether he understood consisted of reminders by the trial court that defendant was not a lawyer and therefore might not be aware of all of the legal rules applicable to his case. However, the trial court asked other questions that established defendant's understanding of the most important consequences of self-representation: that the trial court would not provide legal assistance to defendant, that defendant would be held to the same standards as a litigant with legal representation, and that the burden of proof in a probation revocation case was lower than that in a criminal trial and required only proof to the judge's satisfaction. We conclude that the trial court's decision to allow defendant to represent himself would have been valid even if the court had omitted these questions.

In addition, "[i]t is axiomatic that 'it is within a trial court's discretion to determine the weight and credibility that should be given to all evidence that is presented during the trial.' " *Don't Do It Empire, LLC v. Tenntex*, __ N.C. App. __, __, 782 S.E.2d 903, 910 (2016) (quoting *Clark v. Dyer*, __ N.C. App. __, __, 762 S.E.2d 838, 848 (2014), *cert. denied*, 368 N.C. 424, 778 S.E.2d 279 (2015)). Thus, the trial court could properly evaluate the credibility of defendant's contention that he did not understand one or more of the trial court's statements. In this regard, the trial court was also allowed to consider the fact that defendant consistently asserted that because he was a "Moorish National" or "sovereign citizen" he was not subject to the court's jurisdiction.

"[S]o-called 'sovereign citizens' are individuals who believe they are not subject to courts' jurisdiction[.] . . . [C]ourts repeatedly have been confronted with sovereign citizens' attempts to delay judicial proceedings, and summarily have rejected their legal theories as frivolous." *United States v. Davis*, 586 Fed. Appx. 534, 537 (11th Cir. 2014), *adopted by, relief dismissed at* 2015 U.S. Dist. LEXIS 118200 (N.D. Ga. 2015). The courtroom behavior of adherents to the "sovereign citizen" philosophy is sometimes frustrating to trial judges:

> The sovereign citizen typically files lots of rambling, verbose motions and, in court proceedings, will often refuse to respond coherently to even the simplest question posed by the Court. Each question by the judge is volleyed back with a question as to what is the judge's claim and by what authority is the judge even asking a question. . . . In proceedings, the observant sovereign citizen clings doggedly to the sovereign citizen script[.] . . . For the most part, the defendant's statements to the Court are gibberish.

United States v. Cartman, 2013 U.S. Dist. LEXIS 79137 *3 (N.D. Ga. 2013), *aff'd*, 607 Fed. Appx. 888 (11th Cir. Ga. 2015). A defendant's contention that he "does not understand" the proceedings is a common aspect of a "sovereign citizen" defense. For example, in *State v. Mee*, 233 N.C. App. 542, 756 S.E.2d 103 (2014), the defendant challenged the court's jurisdiction, asserting that he was "a sovereign from [Moorish] descent" and a "free indigenous man" with rights under "the United Nations Declaration of Rights of Indigenous Peoples." When the trial court tried to determine whether the defendant wanted appointed counsel, the defendant repeatedly claimed that he understood nothing about the proceedings. On appeal, this Court upheld the trial court's ruling that the defendant had forfeited the right to counsel, noting the trial court's statement that:

> THE COURT: . . . [T]he Court finds as a fact that Mr. Mee is intentionally disrupting these proceedings and intentionally trying to impede his trial. And that was apparent from his demeanor yesterday when I saw him. . . . So despite Mr. Mee's protestations that he does not understand these proceedings, the Court is of the opinion that he understands these proceedings very well, and just is not recognizing the Court[.] . . . He's obstructing these proceedings.

Mee, 233 N.C. App. at 559, 756 S.E.2d at 112-113. Similarly, in *United States v. Rowell*, 2016 U.S. Dist. LEXIS 134510 *7, *adopted by* 2016 U.S. Dist. LEXIS 134511 (E.D. Wis. 2016), the defendant, who claimed to be "a citizen of the Moorish Republic Nation," represented himself at trial. On appeal, the court held that the defendant was competent to waive counsel, notwithstanding the fact that the defendant had claimed not to understand the charges against him:

> . . . Mr. Ali Bey has chosen to proceed *pro se* and made his jurisdictional arguments without the assistance of counsel. Based on my in-court interactions with Mr. Ali Bey, I have concluded that he is intelligent, aware of his surroundings, and cognizant of the adverse consequences that can attend self-representation. . . . To be sure, at times Mr. Ali Bey asserted that he did not understand the charges against him or the penalties he faced. But his statements stemmed, from my observation, from his refusal to recognize the authority of the United States and not from a failure of comprehension.

We wish to be clear that this Court is not expressing an opinion on the sincerity of defendant's claim not to have understood two of the trial court's questions. Rather, we are simply noting that the trial court was charged with determining the credibility of defendant's statements. We also observe that after defendant indicated that he did not understand the trial court's statements, the court gave defendant an opportunity to ask questions and defendant indicated that he had no questions. We conclude that, on the facts of this case, the trial court's determination that defendant had made a voluntary, intelligent, and knowing waiver of counsel was not invalidated merely because defendant answered "No" when asked if he understood two of the trial court's questions.

Defendant also argues that the trial court failed to inform him of the nature of the charges and the proceedings and of the possible sentences that might be imposed. Defendant acknowledges that the trial court

reviewed these matters immediately before asking defendant whether he wished to retain counsel, seek assignment of counsel, or represent himself. Defendant contends, however, that the court's statements on the charges and possible penalties were not valid because the trial court did not repeat the same information after defendant asked to proceed *pro se*. Defendant cites no authority in support of this argument, and we conclude that defendant is not entitled to relief on this basis.

Finally, defendant asserts that when he requested that the trial court appoint standby counsel, defendant "was no longer unequivocally requesting to proceed *pro se*." In support of this position, defendant cites *Thomas*, in which the defendant stated that he did not want to proceed *pro se* or to be represented by counsel, but instead sought a "hybrid representation" in which the defendant would function as the "lead attorney" along with assigned counsel. *Thomas* is inapplicable to the present case, and defendant cites no authority holding that a defendant's request for standby counsel automatically invalidates his otherwise clear and unequivocal request to proceed *pro se*.

For the reasons discussed above, we conclude that the trial court did not err by granting defendant's request to represent himself at the probation revocation hearing. Defendant has raised no other challenges to the judgments that activated his suspended sentences and we conclude that these judgments should be

AFFIRMED.

Judges STROUD and McCULLOUGH concur.

STATE OF NORTH CAROLINA
v.
RONNIE PAUL GODBEY

No. COA15-877

Filed 15 November 2016

1. Evidence—privileged communications—consensual sexual activity between husband and wife—child sex abuse prosecution

In defendant's prosecution for child sexual abuse, the trial court did not err by admitting privileged evidence over objection about consensual sexual activity between defendant and his wife pursuant to N.C.G.S. § 8-57.1.

2. Evidence—consensual sexual activity between husband and wife—child sex abuse prosecution—pattern or modus operandi

In defendant's prosecution for child sexual abuse, the trial court abused its discretion by overruling defendant's Rule 401 and 404(b) objections to the admission of evidence regarding consensual sexual activity between defendant and his wife. The evidence of the unique sexual act showed defendant's pattern or modus operandi and was not outweighed by its prejudicial effect.

Appeal by defendant from judgment entered 8 December 2014 by Judge Christopher W. Bragg in Rowan County Superior Court. Heard in the Court of Appeals 9 February 2016.

Attorney General Roy Cooper, by Special Deputy Attorney General Anita LeVeaux, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender James R. Grant, for the defendant-appellant.

BRYANT, Judge.

Where N.C. Gen. Stat. § 8-57.1 is applicable in any judicial proceeding in which the abuse of a child is in issue, the trial court did not err in applying section 8-57.1 to defendant's criminal prosecution for child sexual abuse. Further, because the privileged material was evidence of defendant's pattern or modus operandi and was not outweighed by its

prejudicial effect, it was not erroneously admitted under Rules 401, 403, or 404(b), and we find no error in the judgment of the trial court.

Ronnie Paul Godbey, defendant, and Karen Godbey ("Karen"), were married in 1996. At the time, Karen had two children: a three-year-old son and a daughter, Stephanie.[1] Karen and defendant later had two children together in 2002 and 2008. All four children lived with the couple.

One day in May 2010, when Stephanie was nineteen years old, Karen asked Stephanie to help care for her siblings. Stephanie, who was on the phone with her boyfriend, said she already had plans. Karen asked Stephanie to get off the phone and when Stephanie refused, Karen pulled the phone away and slapped her. When Karen told Stephanie she had to stay home and babysit, Stephanie walked out, at which point Karen said, "[I]f you leave, don't come back."

After this argument, Stephanie stayed with a friend, Millie, for a few weeks. At some point, Stephanie and Millie went to the home of Stephanie's maternal grandfather, Larry Gobble, where Millie told Gobble that her house was too small for Stephanie to continue staying with her. Stephanie told Gobble that she could not go back home and, Gobble, who testified for the State, said,

> well, here's the deal, unless you got some specific reason, like, you've been physically abused or you're in harms [sic] way of something being -- in some kind of danger, you're not going to come to my house and live. You're going to go home and work the problems out with your mother.

At this point, Stephanie told Gobble that defendant had "abused" her at night while Karen was sleeping, but did not go into further detail. Gobble asked Stephanie if she had told Karen, and Stephanie said she had not because she thought Karen would not believe her. Stephanie stayed with Millie for another week or so. Then, after discussing the situation with his pastor, Gobble allowed Stephanie to move into his home.

At some point during the next day or two after Stephanie first told her grandfather about the alleged abuse, Gobble arranged for Stephanie to speak with Karen over the phone. Stephanie told Karen that defendant had been coming into her room and "messing with" her and "bothering" her, which Stephanie later testified at trial had been going on since she was about ten years old and continued until her eighteenth birthday.

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1. Because the victim was a minor during the time the crimes were committed, a pseudonym is used to protect her identity.

Stephanie and Karen agreed to meet to talk further and Stephanie told Karen that defendant "would do things to her" and "molest[ed]" her. Karen was upset and in tears and suggested talking to a pastor. Stephanie agreed, and the two met with a pastor that day.

When Stephanie left the meeting with Karen and the pastor, Karen called defendant and asked him to meet her at the pastor's office. When he arrived, Karen confronted him with Stephanie's allegations. Defendant denied "messing with" Stephanie and appeared very upset. Karen and defendant then went home. Karen later testified that she decided to stay with defendant because she did not believe Stephanie's accusations.

In December 2011, Detective Sarah Benfield with the Rowan County Sheriff's Department spoke with Gobble's pastor after the pastor reported a "past sex abuse." After speaking with the pastor, Detective Benfield interviewed Stephanie. Stephanie alleged that defendant frequently came into her room over the years and (1) rubbed her back, breasts, and vagina; (2) performed cunnilingus on her; (3) inserted his fingers into her vagina; and (4) forced her to perform fellatio. She also claimed that defendant would turn her over and "hump" her back until he ejaculated.

Detective Benfield then talked with Karen and explained all of Stephanie's allegations, including the allegation that defendant would hump Stephanie's back until he ejaculated. About a week after Detective Benfield's meeting with Karen, Karen contacted the detective and said that when defendant engaged her in sexual activity, he would do the same "back humping" that Stephanie alleged defendant would do to her. Detective Benfield had Karen come in and read and sign a statement to that effect, dated 12 January 2012. About a month after she signed the 12 January 2012 statement, Karen contacted Detective Benfield again and told her she wanted to change her earlier statement. On 1 February 2012, Karen met with Detective Benfield and initialed and signed an amended statement, through which she explained that defendant's

> doing something on my back was my idea. We only did it a few times. He would hump me on my back until he ejaculated on my back. It was when I wasn't able to have intercourse. It was consensual, and something we did together intimately, not against my will.

When Detective Benfield spoke with defendant, he denied having any sexual contact with Stephanie, said that Stephanie was lying, and told her that "this all started when she got kicked out of the house."

On 2 April 2012, defendant was indicted on two counts of first degree sex offense with a child, one count of statutory sex offense with a 13-, 14-, or 15-year-old, and three counts of indecent liberties with a child. All six indictments alleged an offense date range of 30 March 2001 through 29 March 2007 (the day before Stephanie's sixteenth birthday). Two years later, superseding indictments issued for the two charges of sex offense with a child. The case came on for trial at the 2 December 2014 Criminal Session of Rowan County Superior Court, the Honorable Christopher W. Bragg, Judge presiding.

Prior to trial, defendant moved to exclude any mention of sex acts between Karen and defendant, including references to Karen's statements to Detective Benfield. Defendant argued that private sex acts between a husband and wife were privileged marital communications under N.C. Gen. Stat. § 8-57(c). The trial court reserved judgment on the matter until Karen testified.

At trial, Stephanie testified about the abuse, including the "back humping." During its case-in-chief, the State did not call Karen as a witness or elicit any testimony from Detective Benfield, or any other witness, about defendant and Karen's sex life. At the close of the State's evidence, defendant asked the trial court to revisit the privilege issue before presentation of defense evidence. While the trial court agreed that sex acts between Karen and defendant were privileged marital communications, it held N.C. Gen. Stat. § 8-57.1 abrogated the privilege in this case.

Prior to the relevant portions of Karen's testimony, defendant renewed his objection to the State's cross-examination about her sex acts with defendant and also objected to such questioning on relevance and Rule 404(b) grounds. The trial court reiterated its prior ruling and overruled defendant's additional objections, holding that evidence of sex acts between Karen and defendant was admissible under Rule 404(b) "almost as a modus operandi . . . [to] show a pattern [of] conduct by [defendant]." On direct, Karen, called as a defense witness, mentioned that she gave statements on two occasions at the sheriff's department regarding Stephanie's allegations and that she signed a statement every time. She did not refer to, and defense counsel did not elicit, testimony regarding the substance of those statements.

The State then cross-examined Karen, over contemporaneous objection, about her statements to Detective Benfield. Karen testified that the sexual activity in question did not begin until after the birth of her and defendant's second child in 2008 (thus, beginning after the date ranges

alleged in the indictments). She explained that it did not entail defendant "humping" her back, but rather involved defendant rubbing his penis "between her butt." On redirect, Karen further explained the sex act she had described to Detective Benfield, stating that it involved defendant rubbing his penis between her oiled butt cheeks until he ejaculated, but that he never "humped" her back. Karen also explained that this was not something she enjoyed, but that it was her idea as sexual intercourse had become painful for her as a result of fibroids after her son's birth in 2008.

Defendant testified and denied abusing or inappropriately touching Stephanie. He also testified on cross-examination as follows:

> Q. Did you ever hear about an allegation and you humping Stephanie's back until you ejaculated?
>
> A. Did -- did I hear about it?
>
> Q. Yes.
>
> A. Yes, I heard about it. It's in the papers.
>
> Q. All right. That's something similar to what you and your wife do, correct?
>
> A. A little bit, but not -- not really.
>
> Q. Your wife's testimony was that didn't begin until 2008, after [your son] was born?
>
> A. That's when she had her problems, yes.

Defendant's ex-wife, son, and sister also testified as character witnesses. After the defense rested, the State re-called Detective Benfield, who testified about Karen's statements, noting that Karen never informed her that the activity she described with defendant only began in 2008. Defendant objected to this line of questioning for "reasons stated previously . . . including privilege."

In charging the jury, the trial court instructed, over defendant's objection that

> [e]vidence has been received tending to show that the defendant and [Karen] engaged in a sexual act where the defendant would rub his penis between her butt cheeks until the defendant ejaculated. This evidence was received solely for the purpose of showing that the defendant had the intent, which is a necessary element of the crime charged in this case, and that there existed in the mind

> of the defendant a common plan or scheme involving the crime charged in this case.
>
> If you believe this evidence, you may consider it, but only for the limited purpose for which it was received. You may not consider it for any other purpose.

After about two-and-a-half hours of deliberation, the jury asked the trial court whether it had to find defendant guilty of the sex offense charges in order to convict him of the indecent liberties offenses. The jury also asked "how [to] determine which act applies" to each indecent liberties charge, noting that all three indictments were worded the same. The trial court responded by instructing the jury that each charged offense was "separate and distinct" and by reiterating the pattern instruction on indecent liberties.

After another two-and-a-half hours of deliberation, the jury submitted a note to the trial court indicating it had reached a verdict in the sex offense cases, but was "unable to agree on an [sic] unanimous decision" in the indecent liberties cases. In response, the trial court dismissed the jury for the weekend and instructed it to return on Monday for further deliberations.

When the jury returned Monday morning, it asked to review defense exhibits 1–14, which included an illustrative diagram of the Godbey family home and pictures of the family. At 2:42 p.m., the jury indicated it had reached a unanimous verdict in one of the indecent liberties cases, but, with regard to the remaining charges, the jury foreman told the court that he "believe[d] that [the jury] could spend days discussing [the] two remaining charges without reaching an [sic] unanimous decision."

The trial court then gave the jury an *Allen* charge, typically given to encourage a deadlocked jury to try and reach a verdict, and allowed another hour and a half of deliberations. After the hour and a half of deliberations, the trial court declared a mistrial on the two remaining indecent liberties charges. In the other cases, the jury acquitted defendant of the three sex offense charges, but convicted him of one count of indecent liberties. Defendant was sentenced to sixteen to twenty months' imprisonment for the indecent liberties conviction and ordered to register as a sex offender for thirty years. Defendant entered oral notice of appeal.

On appeal, defendant argues that the trial court erred (I) by admitting privileged evidence over objection about consensual sexual activity

between defendant and his wife pursuant to N.C. Gen. Stat. § 8-57.1; and (II) abused its discretion by overruling defendant's Rule 401 and 404(b) objections to evidence about consensual sexual activity between defendant and his wife.

I

[1] Defendant first argues that the trial court erred by admitting, over objection, privileged evidence about consensual sexual activity between defendant and his wife and that this error entitles him to a new trial. Specifically, defendant contends the trial court erroneously concluded that the marital communications privilege did not apply to the evidence about spousal sexual activity as N.C. Gen. Stat. § 8-57.1 waives that privilege. Defendant argues that N.C.G.S. § 8-57.1 does not completely abrogate the privilege, but rather is limited to "judicial proceeding[s] related to a report pursuant to the Child Abuse Reporting Law," and therefore the trial court erroneously concluded that N.C.G.S. § 8-57.1 creates a broad exception to the marital communications privilege in all cases. We disagree.

Whether a communication is privileged is a question of law reviewed *de novo* by this Court. *See Nicholson v. Thom*, 236 N.C. App. 308, 318, 763 S.E.2d 772, 779 (2014). " 'Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment' for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632–33, 669 S.E.2d 290, 294 (2008) (quoting *In re Appeal of the Greens of Pine Glen Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)).

"[T]he marital communications privilege is premised upon the belief that the marital union is sacred and that its intimacy and confidences deserve[] legal protection." *State v. Rollins*, 363 N.C. 232, 236, 675 S.E.2d 334, 337 (2009) (citing *Hicks v. Hicks*, 271 N.C. 204, 205, 155 S.E.2d 799, 800 (1967)). "[W]hatever is known by reason of that intimacy should be regarded as knowledge confidentially acquired, and . . . neither [spouse] should be allowed to divulge it to the danger or disgrace of the other." *Hicks*, 271 at 205, 155 S.E.2d at 800 (citation omitted). In addition to protecting verbal expression, the marital communications privilege also protects actions which are "intended to be . . . communication[s] and [are] the type of act[s] induced by the marital relationship." *State v. Hammonds*, 141 N.C. App. 152, 171, 541 S.E.2d 166, 180 (2000) (citations omitted).

In assessing whether an act or expression is confidential such that it is afforded the protection of the marital privilege, a court must ask whether it was "prompted by the affection, confidence, and loyalty engendered by" the marriage. *Rollins*, 363 N.C. at 237, 675 S.E.2d at

337 (citations omitted); *see also State v. Freeman*, 302 N.C. 591, 596, 276 S.E.2d 450, 453 (1981) (modifying the common law rule to hold that "spouses shall be incompetent to testify against one another in a criminal proceeding only if the substance of the testimony concerns a 'confidential communication' between the marriage partners made during the duration of their marriage"). A court must also consider "[t]he circumstances in which the communication takes place, including the physical location and presence of other individuals . . . ." *Rollins*, 363 N.C. at 237, 675 S.E.2d at 337. There "must be a reasonable expectation of privacy on the part of the holder and the intent that the communication be kept secret." *Id.* at 238, 675 S.E.2d at 338.

The North Carolina Supreme Court has specifically held that sex between spouses is subject to the marital communications privilege. *Wright v. Wright*, 281 N.C. 159, 166–67, 188 S.E.2d 317, 322 (1972); *see Biggs v. Biggs*, 253 N.C. 10, 16, 116 S.E.2d 178, 183 (1960) ("[A]n act of intercourse between husband and wife is a confidential communication."), *overruled in part by Hicks*, 271 N.C. at 207, 155 S.E.2d at 802 (declining to follow *Biggs* "where there [was] a completely different factual situation").

While North Caroline General Statutes section 8-57 provides "[n]o husband or wife shall be compellable *in any event* to disclose any confidential communication made by one to the other during their marriage[,]" N.C. Gen. Stat. § 8-57(c) (2015) (emphasis added), there are exceptions:

> (b) The spouse of the defendant shall be *competent but not compellable* to testify for the State against the defendant in any criminal action or grand jury proceedings, except that the spouse of the defendant shall be both competent and compellable to so testify:
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> . . .
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> (5) In a prosecution of one spouse for any other criminal offense against the minor child of either spouse, including any child of either spouse who is born out of wedlock or adopted or a foster child.

Id. § 8-57(b)(5); *see also Biggs*, 253 N.C. at 16–17, 116 S.E.2d at 183 ("It is true that an act of intercourse between husband and wife is a confidential communication. But the statute merely provides that 'no husband or wife shall be *compellable* to disclose any confidential communication.' [The husband's] testimony (and that of his wife) was *voluntarily given*; there was no effort to compel such testimony." (emphasis added)). In

other words, sections 8-57(b)(5) and (c) together provide that a witness-spouse may voluntarily testify about the abuse of a child, even over the objection of the defendant-spouse, but may not be compelled to do so. N.C.G.S. § 8-57(b)(5), (c).

N.C. General Statutes, section 8-57.1, however, abrogates the marital communications privilege even further with regard to cases of child abuse:

> Notwithstanding the provisions of G.S. 8-56 and G.S. 8-57, the husband-wife privilege shall not be ground for excluding evidence regarding the abuse or neglect of a child under the age of 16 years or regarding an illness of or injuries to such child or the cause thereof in any judicial proceeding related to a report pursuant to the Child Abuse Reporting Law, Article 3 of Chapter 7B of the General Statutes of North Carolina.

N.C.G.S. § 8-57.1 (2015).

"Questions of statutory interpretation are questions of law[.] . . ." *First Bank v. S & R Grandview, L.L.C.*, 232 N.C. App. 544, 546, 755 S.E.2d 393, 394 (2014). "The primary objective of statutory interpretation is to give effect to the intent of the legislature." *Id.* (citing *Polaroid Corp. v. Offerman*, 349 N.C. 290, 297, 507 S.E.2d 284, 290 (1998)). "The plain language of a statute is the primary indicator of legislative intent." *Id.* (citation omitted). "If the statutory language is clear and unambiguous, the court eschews statutory construction in favor of giving the words their plain and definite meaning." *State v. Beck*, 359 N.C. 611, 614, 614 S.E.2d 274, 277 (2005) (citation omitted). However, "statutory provisions must be read in context: 'Statutes dealing with the same subject matter must be construed *in pari materia*, as together constituting one law, and harmonized to give effect to each.' " *First Bank*, 232 N.C. App. at 546, 755 S.E.2d at 395 (quoting *Williams v. Williams*, 299 N.C. 174, 180–81, 261 S.E.2d 849, 854 (1980)); *see Abernethy v. Bd. of Commr's of Pitt Cnty.*, 169 N.C. 631, 636, 86 S.E. 577, 580 (1915) (noting that in construing statutes, the court "may call to [its] aid . . . other laws or statutes related to the particular subject or to the one under construction, so that [it] may know what the mischief was which the Legislature intended to remove or remedy").

General Statutes, section 8-57 is titled "Husband and wife as witnesses in criminal actions," and subsection (c) states as follows: "No husband or wife shall be compellable *in any event* to disclose any confidential communication made by one to the other during their marriage."

N.C.G.S. § 8-57(c) (emphasis added). Section 8-57(c) provides that confidential communications between a husband and wife shall not be admitted into evidence at the objection of either the husband or the wife. *State v. Holmes*, 330 N.C. 826, 827, 829, 412 S.E.2d 660, 661, 662 (1992); *cf. Biggs*, 253 N.C. at 16–17, 116 S.E.2d at 183. Section 8-57.1, titled "Husband-wife privilege waived in child abuse," states in pertinent part as follows: "*Notwithstanding the provisions of G.S. 8-56 and G.S. 8-57*, the husband-wife privilege shall not be ground for excluding *evidence regarding the abuse or neglect of a child under the age of 16 years* . . . ." N.C.G.S. § 8-57.1 (emphasis added).

The only North Carolina case which cites to this statutory provision quotes the statute as follows: "Section 8-57.1 provides that notwithstanding the provisions of sections 8-56 and 8-57, 'the husband-wife *privilege* shall not be ground for excluding evidence [under certain circumstances relating to the abuse or neglect of a child under the age of sixteen years].' " *Holmes*, 330 N.C. at 834, 412 S.E.2d at 664–65 (alteration in original) (quoting N.C.G.S. § 8-57.1).

In *Holmes*, two codefendants were found guilty of second-degree murder, and at issue on appeal was "whether a witness spouse may testify at trial as to confidential communications made to her by defendant spouse over defendant spouse's objection and assertion of privilege." *Id.* at 827, 412 S.E.2d at 661. In holding that "she may not," the N.C. Supreme Court cited to N.C.G.S. § 8-57.1 for the purpose of negating the State's argument that N.C.G.S. § 8-57 "abolishe[d] the common law rule against the disclosure of confidential marital communications, leaving only a rule against being *compelled* to disclose a confidential marital communication . . . argu[ing] that section 8-57(b) makes the spouse *competent* to testify, and section 8-57(c) gives the privilege of not being *compelled* to the witness spouse . . . ." *Id.* at 827, 829, 412 S.E.2d 661, 662 (emphasis added).

In negating the State's argument outlined above, the N.C. Supreme Court reasoned that, "[i]f, as the State suggests, section 8-57 abolished the husband-wife privilege against disclosure of confidential communications made by one to the other during their marriage, section 8-57.1 would seem to be unnecessary." *Id.* at 834, 412 S.E.2d at 665; *see also* Note, Douglas P. Arthurs, Spousal Testimony in Criminal Proceedings—*State v. Freeman*, 17 Wake Forest L. Rev. 990, 995 (1981) (noting that "G.S. 8-57 was adopted to eliminate the incongruous result that a defendant could testify in his own behalf, but his spouse could not testify for or against him"). In other words, because N.C.G.S. § 8-57.1 abrogates the marital communications privilege "under certain circumstances" (not

those present in *Holmes*), N.C.G.S. § 8-57.1 would be redundant if section 8-57 functioned to abolish the privilege in its entirety. *See Holmes*, 330 N.C. at 833–34, 412 S.E.2d at 664–65; *see also State v. Williams*, 286 N.C. 422, 431, 212 S.E.2d 113, 119 (1975) ("[A] statute must be construed, if possible, so as to give effect to every part of it, it being presumed that the Legislature did not intend any of its provisions to be surplusage." (citation omitted)); *In re Hickerson*, 235 N.C. 716, 721, 71 S.E.2d 129, 132 (1952) ("[P]arts of the same statute, and dealing with the same subject, are to be considered and interpreted as a whole, and in such case it is the accepted principle of statutory construction that every part of the law shall be given effect if this can be done by any fair and reasonable intendment . . . ." (citations omitted)). This line of reasoning provides guidance to this Court in deciding the ultimate breadth of this statute's reach and whether or not N.C.G.S. § 8-57.1 is applicable in this case.

Although not binding on this Court, a Kentucky Supreme Court opinion has addressed this precise issue: whether a child abuse reporting statute which abrogates the marital privilege in child abuse cases may be applied to a *criminal* prosecution of a defendant for the sexual abuse of a child. *Mullins v. Commonwealth*, 956 S.W.2d 210, 210–11 (Ky. 1997). In *Mullins*, the defendant's wife "found him engaged in acts of sodomy with a 14-year-old babysitter." *Id.* at 211. The wife called the police and later testified against her husband to the grand jury. *Id.* However, by the time of trial, both the defendant and his wife claimed the marital privilege. *Id.* The Kentucky Court of Appeals affirmed the defendant's conviction for third-degree sodomy, stating that the trial court did not err in applying KRS 620.050(2) (Kentucky's statute abrogating both the professional-client/patient privilege and the marital privilege in cases of dependent, neglected, or abused children) in a *criminal* prosecution, stating the statute "declares that the husband and wife privilege is inapplicable in a criminal proceeding regarding a dependent, neglected or abused child." *Id.* (emphasis added).

In affirming the Court of Appeals' and the judgment of the trial court, the Kentucky Supreme Court reasoned as follows:

> The General Assembly may legislate in order to protect children, and it may determine that children's rights are paramount when there is a conflict with the privilege of an adult to exclude evidence regarding the abuse, dependency or neglect of a child. KRS Chapter 620 meets the legislative purpose of safeguarding the interests of children. The statute does not interfere with any judicial function, but rather it enhances it by refusing to allow a shield

> to a child abuser in the form of the husband-wife privilege and thereby improves the truth-finding function of the judicial process.
>
> The exceptions provided in KRE 504(c)(2) reflect the fact that the marital privilege is considered by many to be in disfavor as a result of abuses which prevent ascertaining the truth. The privilege exists only to protect marital harmony. . . .
>
> The courts have approached the privilege by narrowly and strictly construing it because it has the potential for shielding the truth from the court system. Many courts have determined that when the reason supporting the privilege, marital harmony, no longer exists, then the privilege should not apply to hide the truth from the trier of fact.
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> . . . .
>
> Marital harmony can hardly be a valid legal principle when the wife in question calls the police to report the alleged sexual misdeeds of her husband with a child. The marital privilege is subordinate or inferior to the right of a child to be free from sexual abuses.

Id. at 212 (internal citations omitted); *see Kays v. Commonwealth*, ___ S.W.3d ___, ___, NO. 2014-CA-001924-MR, 2016 WL 5956995, at *8 (Ky. Oct. 14, 2016) (citing *Mullins*, 956 S.W.2d at 211) (involving third-degree rape and sodomy of a fifteen-year-old-girl where the defendant confided in his then-wife "[w]hen details of how he preyed upon his former student began unraveling" and the defendant sought to invoke spousal privilege) ("*Mullins* remains the law in Kentucky.").

Furthermore, the *North Carolina Juvenile Code: Practice and Procedure*'s interpretation of North Carolina's statute abrogating the marital privilege in cases of child abuse, N.C.G.S. § 8-57.1, seems to support a similar policy to the one enunciated in *Mullins*, namely that "[t]he marital privilege is subordinate or inferior to the right of a child to be free from sexual abuses." 956 S.W.2d at 212. *Practice and Procedure* states that "with respect to certain privileges, the privilege does not extend to circumstances where the information requires a mandatory report of child neglect or abuse *or where the information otherwise pertains to and is being sought in a proceeding concerning the abuse and neglect of a child*." Thomas R. Young, *N.C. Juvenile Code: Prac. & Proc.* § 5:2 (May 2016) (emphasis added).

Even if N.C.G.S. § 8-57.1 is not a model of clarity, N.C. Gen. Stat. § 7B-310 contains similar language, and reading N.C.G.S. § 8-57.1 as applicable to "any judicial proceeding" is supported by the express limitations placed upon all privileges as enunciated in N.C.G.S. § 7B-310:

> No privilege, except the attorney-client privilege, shall be grounds for excluding evidence of abuse, neglect, or dependency *in any judicial proceeding* (civil, *criminal*, or juvenile) in which a juvenile's abuse, neglect, or dependency is in issue *nor* in any judicial proceeding resulting from a report submitted under this Article, both as this privilege relates to the competency of the witness and to the exclusion of confidential communications.

N.C.G.S. § 7B-310 (2015) (emphasis added).

In *State v. Byler*, this Court examined and compared the language of N.C. Gen. Stat. § 8-53.1 (regarding the physician-patient privilege) and N.C.G.S. § 7B-310, ultimately concluding that "these two sections are to be read together[,]" as "the doctor-patient privilege cannot serve to shield information from the jury when a defendant is on trial for child abuse." No. COA03-453, 2004 WL 2584962, at *3 (N.C. Ct. App. Nov. 16, 2004) (unpublished) (citation omitted) (affirming the trial court's admission of statements made by a psychologist who was hired by defense counsel to evaluate the defendant in the defendant's prosecution for the statutory rape of his own daughter). Because the language in N.C.G.S. § 8-53.1 almost exactly mirrors the language of N.C.G.S. § 8-57.1,[2] with the exception that section 8-53.1 deals with physician-patient privilege and section 8-57.1 with the marital privilege, this Court's analysis in *Byler* is highly instructive:

> [T]he plain language of section 7B-310 seems to create dual applicability by using the word "nor" and admonishing the use of the privilege in a "judicial proceeding" where

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2. N.C.G.S. § 8-53.1 reads as follows:

> (a) Notwithstanding the provisions of G.S. 8-53 and G.S. 8-53.13, the physician-patient or nurse privilege shall not be a ground for excluding evidence regarding the abuse or neglect of a child under the age of 16 years or regarding an illness of or injuries to such child or the cause thereof in any judicial proceeding related to a report pursuant to the North Carolina Juvenile Code, Chapter 7B of the General Statutes of North Carolina.

N.C.G.S. § 8-53.1(a) (2015).

> abuse is at issue, independent of whether the proceeding resulted from a report. This interpretation is bolstered by the fact that section 8-53.1 uses "related to" instead of "resulting from," as in 7B-310 and these two sections are to be read together. *See State v. Etheridge*, 319 N.C. 34, 39–41, 352 S.E.2d 673, 677–78 (1987) (supporting this interpretation and applying these statutes to a criminal trial based on rape and other sexual offenses).

Id.; *see* N.C.G.S. § 8-57.1 ("[T]he husband-wife privilege shall not be ground for excluding evidence regarding the abuse . . . of a child . . . in any judicial proceeding *related to* a report pursuant to the Child Abuse Reporting Law . . . ."); *see also* Young, *N.C. Juvenile Code: Prac. & Proc.* § 5:2 n.14 ("N.C. Gen. Stat. § 8-53.1 (physician and nurse privilege not ground for excluding evidence regarding abuse or neglect of a child under the age of 16 years in Chapter 7B proceeding); N.C. Gen. Stat. § 8-57.1 (*husband and wife privilege same as physician and nurse*)[.]" (emphasis added)).

Thus, in the instant case, independent of whether defendant's prosecution for, *inter alia*, taking indecent liberties with a child *resulted from* a report made pursuant to the Child Abuse Reporting Law, it is sufficient that defendant's criminal prosecution for child sexual abuse was a "judicial proceeding *related to* a report pursuant to" the same. *See* N.C.G.S. § 8-57.1; *Byler*, 2004 WL 2584962, at *3. As such, sections 8-57.1 and 7B-310 "are to be read together[,]" *Byler*, 2004 WL 2584962, at *3, and, in a criminal proceeding regarding allegations of the sexual abuse of a juvenile, like the instant case, with the exception of the attorney-client privilege, "[n]o privilege," including the marital communications privilege, can be exercised to exclude evidence of such abuse. *See* N.C.G.S. § 7B-310; *see also* N.C.G.S. § 8-57.1.

"We believe the legislature, in balancing the [long-standing policy "to protect the intimacy of the marital union[,]" *Rollins*, 363 N.C. at 235, 675 S.E.2d at 336,] against the need to protect child victims, opted to provide the broadest possible exceptions to the [marital communications] privilege." *See State v. Etheridge*, 319 N.C. 34, 41, 352 S.E.2d 673, 677 (1987) ("We believe the legislature, in balancing the need for confidential medical treatment against the need to protect child victims, opted to provide the broadest possible exceptions to the physician-patient privilege."). Accordingly, the trial court did not err in applying N.C.G.S. § 8-57.1 to defendant's prosecution for child sexual abuse offenses, and defendant's argument is overruled.

II

[2] Defendant next argues the trial court abused its discretion by overruling defendant's Rule 401 and 404(b) objections to the admission of the same evidence described above—the consensual sexual activity between defendant and his wife. Specifically, defendant argues Karen's testimony regarding the sexual act was irrelevant as it was neither temporally proximate nor similar enough to Stephanie's allegations to warrant admission under Rule 404(b) and, further, that even if Karen's testimony had some minimal probative value, that value was substantially outweighed by the danger of unfair prejudice. Defendant contends that because there is a reasonable possibility that the trial court's errors contributed to defendant's conviction, he should be granted a new trial. We disagree.

"Evidentiary errors are harmless unless a defendant proves that absent the error a different result would have been reached at trial." *State v. Ferguson*, 145 N.C. App. 302, 307, 549 S.E.2d 889, 893 (2001) (citation omitted).

> Because the trial court is better situated to evaluate whether a particular piece of evidence tends to make the existence of a fact of consequence more or less probable, the appropriate standard of review for a trial court's ruling on relevancy pursuant to Rule 401 is not as deferential as the 'abuse of discretion' standard which applies to rulings made pursuant to Rule 403.

Dunn v. Custer, 162 N.C. App. 259, 266, 591 S.E.2d 11, 17 (2004) (citation omitted). Pursuant to Rule 401, evidence is relevant if it has any tendency to make the existence of a fact of consequence more or less probable. N.C. Gen. Stat. § 8C-1, Rule 401 (2015). "We review de novo the legal conclusion that the evidence is, or is not, within the coverage of Rule 404(b)." *State v. Beckelheimer*, 366 N.C. 127, 130, 726 S.E.2d 156, 159 (2012). Rule 404(b) is a

> general rule of *inclusion* of relevant evidence of other crimes, wrongs or acts by a defendant, subject to but *one exception* requiring its exclusion if its *only* probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged.

State v. Coffey, 326 N.C. 268, 278–79, 389 S.E.2d 48, 54 (1990). "[A]ll evidence favorable to the [State] will be, by definition, prejudicial

to defendants. The test . . . is whether that prejudice to defendants is unfair." *Matthews v. James*, 88 N.C. App. 32, 39, 362 S.E.2d 594, 599 (1987). "The term 'unfair prejudice' means 'an undue tendency to suggest decision on an improper basis[.]' " *State v. Summers*, 177 N.C. App. 691, 697, 629 S.E.2d 902, 907 (2006) (alteration in original) (quoting *State v. DeLeonardo*, 315 N.C. 762, 772, 340 S.E.2d 350, 357 (1986)).

> Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

N.C. Gen. Stat. § 8C-1, Rule 404(b) (2015). "[P]rior acts are sufficiently similar if there are some unusual facts present in both [act]s that would indicate that the same person committed them." *State v. Davis*, 222 N.C. App. 562, 567, 731 S.E.2d 236, 240 (2012) (citation omitted). "Two constraints govern admission of evidence under Rule 404(b): similarity and temporal proximity." *Summers*, 177 N.C. App. at 696, 629 S.E.2d at 906 (citation omitted).

Here, Stephanie described to Karen the sexual act performed by defendant, which description initially prompted Karen to sign a statement indicating she and defendant engaged in the same act. Stephanie testified the sexual act was a follows: "[Defendant] would turn [her] over on [her] stomach and he would hump [her] back until he ejaculated all over [her] back." Over defendant's objections before and during the following testimony, Karen testified on cross-examination as follows:

> Q. Was one of [Stephanie's] allegations Detective Benfield told you about, where [defendant] would go into [Stephanie's] room and hump her back until he ejaculated?
>
> A. Yes.
>
> Q. All right. Did that allegation surprise you?
>
> A. Every allegation surprised me.
>
> Q. Okay. Is that something that [defendant] and you did intimately together?
>
> . . .
>
> A. It was. And when you -- when she said it, I - - I thought about it, and I called her, and I discussed it with her. And

> then later on, it -- it was an issue after I had [my son in 2008]. I had problems, so it was -- it was something that I came up with because we couldn't do anything, but it wasn't the exact act either.
>
> Q. All right. Well tell me about the act then, ma'am.
>
> . . .
>
> A. I had -- after I had [my son] I had fibroids, so -- which is a female -- well, it was in your -- in your -- on your female organs. So it would be painful to have intercourse. So I suggested that defendant -- it -- it was -- see, when you -- when you hear front and back on your -- you know, the -- I mean, this is your front and this is your back, so I automatically thought about my -- you know, it's your backside. But it was in an area -- it was not on my back, it was between my butt and it was -- that he would -- we would just -- he would move around there until -- in the butt area.
>
> Q. Until he ejaculated?
>
> A. Yes.

Here, Karen's testimony was relevant to Stephanie's allegations—the sexual act Karen described was admissible as it showed a common scheme or plan, pattern, and/or common modus operandi and sufficient similarity to Stephanie's allegations of sexual abuse. *See* N.C.G.S. § 8C-1, Rule 404(b). Both Stephanie and Karen testified that defendant would engage in a sexual act whereby defendant would ejaculate on them, respectively, from behind. Even if Karen later amended her statement to differentiate the sexual act she and defendant engaged in from the sexual act Stephanie alleged defendant perpetrated on her, Detective Benfield testified that in her initial conversation with Karen, Karen "stated . . . that [defendant] did the same thing to her[,]" and Karen herself testified that the sexual act alleged by Stephanie whereby defendant would "hump her back," was one that she and defendant also engaged in. Indeed, where Karen's credibility as a witness is called into question, particularly with regard to the differing statements she made to Detective Benfield, credibility goes to the weight of the evidence, not its admissibility. *See State v. Stager*, 329 N.C. 278, 317, 406 S.E.2d 876, 898 (1991) ("The conflict in the evidence goes to the weight and credibility of the evidence not its admissibility.").

Defendant argues that the instant case is similar to *State v. Dunston*, in which the charges arose out of allegations that the defendant vaginally

and anally raped his foster daughter. 161 N.C. App. 468, 469, 588 S.E.2d 540, 542 (2003). In *Dunston*, the State elicited testimony from the defendant's wife that the defendant engaged in and liked consensual anal sex. *Id.* at 469, 472–73, 588 S.E.2d at 542, 544–45. This Court concluded that this fact, "[wa]s not by itself sufficiently similar to engaging in anal sex with an underage victim *beyond the characteristics inherent to both*, i.e., they both involve anal sex, [in order] to be admissible under Rule 404(b)." *Id.* at 473, 588 S.E.2d at 544–45 (emphasis added). This Court held "this evidence was not relevant for any purpose other than to prove [the] defendant's propensity to engage in anal sex, and thus, the trial court erred in admitting this evidence." *Id.* at 473, 588 S.E.2d at 545.

Here, the evidence was not offered to prove defendant's propensity to engage in a categorically defined sexual act, but rather was offered to show the similarity between the unique sexual act alleged by Stephanie and that described by Karen. Indeed, the sexual act alleged by Stephanie was so unique that Karen called Detective Benfield back after they spoke the first time as soon as she realized that she and defendant engaged in a sexual activity similar to the one Stephanie described:

> Q. . . . And when Detective Benfield told you [about Stephanie's allegation that defendant would go into her room and hump her back until he ejaculated], what did you say to her?
>
> A. I didn't say anything at the time until I went home and thought about everything.
>
> Q. All right. And then you called her back and told her that you had thought about that specific act, correct?
>
> A. Uh-huh, (affirmative.) Yes.

Karen described this particular sexual activity to Detective Benfield on two separate occasions and signed a statement to that effect which she read and understood before she signed it. Karen's statement read as follows:

> [Defendant] doing something on my back was my idea. We only did this a few times. He would hump me on my back until he ejaculated on my back. It was when I wasn't able to have intercourse. It was consensual, and something we did together intimately, not against my will.

The instant case is distinguishable from *Dunston* in that it does not involve a categorical or easily-defined sexual act, i.e., anal sex. Rather,

the instant case involves a more unique sexual act which both Stephanie and Karen described, at some point, as defendant "hump[ing] on [the] back until he ejaculated on [the back]." Accordingly, the State was able to show sufficient similarity between the acts "beyond those characteristics inherent to [the act]." *See State v. Al-Bayyinah*, 356 N.C. 150, 155, 567 S.E.2d 120, 123 (2002) (citation omitted).

With regard to the "temporal proximity" prong of the Rule 404(b) analysis, "remoteness in time *generally* affects only the weight to be given [404(b)] evidence, not its admissibility." *State v. Maready*, 362 N.C. 614, 624, 660 S.E.2d 564, 570 (2008) (alteration in original) (quoting *State v. Parker*, 354 N.C. 268, 287, 553 S.E.2d 885, 899 (2001)). "Remoteness for purposes of 404(b) must be considered in light of the specific facts of each case and the purposes for which the evidence is being offered." *State v. Mobley*, 200 N.C. App. 570, 577, 684 S.E.2d 508, 512 (2009) (quoting *State v. Hipps*, 348 N.C. 377, 405, 501 S.E.2d 625, 642 (1998)).

Here, Stephanie told Detective Benfield that the sexual abuse began in 2002, when she was about ten or eleven years old, and persisted until approximately 2010, when she was about eighteen years old. According to Karen, after the birth of her son in 2008, she developed fibroids. As it was painful for Karen to have intercourse, she suggested defendant have sex with her from the "backside," "in the butt area," until defendant ejaculated. Karen also testified that at no time prior to 2008 did she and defendant either "have sex by [defendant] inserting his penis between [her] butt cheeks" or "have any sex . . . from the back end[.]" Furthermore, Karen did not, at any point, indicate to Detective Benfield in her many statements that the sexual activity at issue occurred in any particular timeframe, nor did she tell Detective Benfield that this activity only happened after her son was born.

Defendant argues that as both defendant and Karen testified that they did not engage in the sexual activity described above until after their son was born in 2008, at which time Stephanie was seventeen years old, and none of the indictments alleged that defendant abused Stephanie after she turned sixteen, the consensual sexual activity at issue between defendant and Karen was too remote in time because it did not begin until at least a year after the last alleged incident of abuse. However, where, as here, that timeline is dependent on Karen and defendant's testimony to that effect, and as remoteness in time generally affects only the weight to be given Rule 404(b) evidence and not its admissibility, the sexual act described by Karen is not too remote in time from the acts Stephanie alleged for purposes of Rule 404(b).

Finally, the probative value of this evidence was not outweighed by the danger of undue prejudice. Whether the trial court should have excluded such evidence under Rule 403 is reviewed by this Court for abuse of discretion. *State v. Whaley*, 362 N.C. 156, 160, 655 S.E.2d 388, 390 (2008) (citations omitted); *State v. Boyd*, 321 N.C. 574, 578, 364 S.E.2d 118, 120 (1988) (finding "no abuse of discretion by the trial court in failing to exclude . . . testimony under the balancing test of Rule 403 since the alleged incident was sufficiently similar to the act charged and not too remote in time"). Not only was the evidence of great probative value, but it was also not so sensitive to be potentially inflammatory to the jury (the jury acquitted defendant of five of the six charges). Thus, we conclude the probative value of this evidence as proof of defendant's pattern or modus operandi is not outweighed by its prejudicial effect. Accordingly, we find no abuse of discretion by the trial court in admitting this testimony under Rule 403, nor did the trial court err in its rulings pursuant to Rules 401 and 404(b).

NO ERROR.

Judges DILLON and ZACHARY concur.

STATE OF NORTH CAROLINA
v.
JAMES HOWARD KILLIAN

No. COA16-268

Filed 15 November 2016

Evidence—driving while impaired—results of roadside sobriety test—officer's interpretation

Where defendant was convicted of impaired driving, the Court of Appeals rejected his argument that the trial court committed plain error by admitting testimony from the law enforcement officer who arrested him regarding the officer's interpretation of the results of a specific roadside sobriety test. Although the challenged testimony was admitted in error, in light of the overwhelming unchallenged evidence of defendant's impairment, he was not prejudiced by the admission of the challenged testimony.

Appeal by Defendant from judgment entered 8 July 2015 by Judge Alan Z. Thornburg in Buncombe County Superior Court. Heard in the Court of Appeals 6 September 2016.

Attorney General Roy Cooper, by Assistant Attorney General Yvonne B. Ricci, for the State.

Jeffrey William Gillette for Defendant.

STEPHENS, Judge.

Defendant appeals from the judgment entered upon his conviction of driving while impaired. Defendant contends that the trial court committed plain error in admitting testimony from the law enforcement officer who arrested him regarding the officer's interpretation of the results of a specific roadside sobriety test. Although we agree with Defendant that the challenged testimony was admitted in error, we conclude that, in light of the overwhelming unchallenged evidence of Defendant's impairment, he was not prejudiced by admission of the challenged testimony. Accordingly, Defendant is not entitled to a new trial.

Factual and Procedural Background

The evidence at trial tended to show the following: This case arises from an early-morning encounter on 29 June 2014 between Defendant James Howard Killian and Corporal Jonathan Ray of the Weaverville Police Department. As Ray was completing an unrelated traffic stop, Killian approached him, complaining that his moped had been "run off the road" by a law enforcement vehicle. Ray immediately detected a strong odor of alcohol emanating from Killian and asked Killian whether he had been drinking and whether he would submit to an Alco-Sensor breath test. Killian agreed to the breath test. The test registered positive for the presence of alcohol. Killian acknowledged having consumed two beers, and Ray asked him to submit to standard field sobriety testing. Killian agreed.

The next test Ray administered was the Horizontal Gaze Nystagmus ("HGN") test. During this test, Ray observed the movement of Killian's eyes for involuntary jerking that may be caused by consumption of alcohol and/or drugs. Ray testified that Killian exhibited signs of possible impairment. Ray next asked Killian to complete the "walk and turn" test, which Killian was unable to complete successfully. Killian declined to attempt the one-leg-stand test, citing pain and swelling in his knee. Ray then asked Killian to repeat the Alco-Sensor breath test, which again

gave a positive result. On the basis of Ray's observation of Killlian's slurred speech and glassy, red eyes, the odor of alcohol emanating from Killian, the two positive breath test results, the HGN test results indicating impairment, and Killian's failure to successfully complete the walk and turn test, in conjunction with his admission to consuming alcohol earlier, Ray determined that he had probable cause to arrest Killian for impaired driving. The entire encounter was recorded by Ray's dashboard camera and was played for the jury at trial.

As Ray took Killian into custody, Killian requested medical attention for his injured knee. Ray called emergency medical services to examine Killian's knee, after which Ray transported Killian to a local hospital for X rays of the knee. At the hospital, Ray read Killian his rights regarding submission of a blood sample to test for alcohol or other impairment. Killian signed a form acknowledging his understanding of his legal rights and submitted a blood sample. When tested, that sample indicated a blood alcohol content ("BAC") of 0.10 milligrams of alcohol per 100 milliliters, a level indicating legal impairment.[1] Once Killian was released from the hospital into Ray's custody, Killian was transported to the Buncombe County Detention Facility.

Killian was cited for driving while impaired and failure to comply with a driver's license restriction. On 11 June 2015, Killian was found guilty in Buncombe County District Court of driving while impaired. On the following day, Killian filed his notice of appeal to superior court. On 2 July 2015, Killian filed several motions in the trial court, including a motion to exclude Ray's testimony about field sobriety tests he administered, on the basis that Ray was not qualified as an expert in the interpretation of the results of such tests. Those motions were denied by the superior court, and Killian's case came on for trial at the 6 July 2015 criminal session of Buncombe County Superior Court, the Honorable Alan Z. Thornburg, Judge presiding. At trial, Killian did not object to Ray's testimony about his administration of the HGN test and Killian's results. The jury returned a guilty verdict, and the trial court imposed a sentence of 24 months in prison, suspended the sentence, and ordered 24 months of supervised probation. From the judgment imposed upon his conviction, Killian gave notice of appeal in open court.

Discussion

In his sole argument on appeal, Killian contends that the trial court plainly erred in denying his motion to exclude Ray's HGN testimony

1. A BAC result of 0.08 or above is one way to establish that a defendant has committed the offense of impaired driving. *See* N.C. Gen. Stat. § 20-138.1(a)(2) (2015).

and in allowing Ray to testify about the results of the HGN test without qualifying Ray as an expert pursuant to North Carolina Rule of Evidence 702(a). While we agree that admission of the HGN testimony was error, we conclude that the error did not have a probable impact on the jury's verdict.

As Killian acknowledges, because he did not object to the admission of the testimony at trial that he now challenges on appeal, he is entitled only to plain error review.

> In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error.

N.C.R. App. P. 10(a)(4). Our State's appellate courts may "review unpreserved issues for plain error when they involve either (1) errors in the judge's instructions to the jury, or (2) rulings on the admissibility of evidence." *State v. Gregory*, 342 N.C. 580, 584, 467 S.E.2d 28, 31 (1996) (citations omitted). Plain error arises when the error is "so basic, so prejudicial, so lacking in its elements that justice cannot have been done . . . ." *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (citations and internal quotation marks omitted). "Under the plain error rule, [a] defendant must convince this Court not only that there was error, but that absent the error, the jury *probably* would have reached a different result." *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993) (citation omitted; emphasis added).

Admission of Ray's testimony about the results of Killian's HGN test was clearly erroneous. North Carolina Rule of Evidence

> 702(a1) requires that, before a witness can testify as to the results of an HGN test, he must be qualified as an expert by knowledge, skill, experience, training, or education. If the witness is so qualified and proper foundation is established, the witness may give expert testimony as to the HGN test results, subject to the additional limitations in subsection (a1). Namely, the expert witness may testify solely on the issue of impairment and not on the issue of specific alcohol concentration, and the HGN test must have been administered by a person who has successfully completed training in HGN.

State v. Godwin, __ N.C. App. __, __, 786 S.E.2d 34, 37 (2016) (citations and internal quotation marks omitted), *disc. review allowed*, __ N.C. __, __ S.E.2d __ (2016), *available at* 2016 WL 5344499. Here, it is undisputed that Ray was not tendered as an expert in HGN interpretation and, accordingly, his testimony was not received as an expert in that field. This was error. *See id.* at __, 786 S.E.2d at 37.

Regarding prejudice, Killian argues that, but for the HGN testimony, the jury "likely" or "very likely" would have acquitted him of driving while impaired and, in support of this contention, Killian asserts that the remaining evidence against him was similar to that in *Godwin*, where we granted the defendant a new trial. While the additional, non-HGN evidence in *Godwin* bears some resemblance to that against Killian, the defendant in *Godwin* objected to the admission of the HGN testimony during his trial, thus preserving his right of appellate review on that issue. *Id.* at __, 786 S.E.2d at 36. Accordingly, in order to receive a new trial, the defendant in *Godwin* only had to establish that there was a *reasonable possibility* that the HGN testimony altered the jury's verdict. *See State v. Helms*, 348 N.C. 578, 583, 504 S.E.2d 293, 296 (1998) ("In order to establish prejudicial error in the erroneous admission of . . . HGN evidence, [a] defendant must show only that had the error in question not been committed, a reasonable possibility exists that a different result would have been reached at trial.") (citation omitted). In contrast,

> [t]he plain error rule applies only in truly exceptional cases. Before deciding that an error by the trial court amounts to plain error, the appellate court must be convinced that absent the error the jury *probably* would have reached a different verdict. In other words, the appellate court must determine that the error in question *tilted the scales* and caused the jury to reach its verdict convicting the defendant. Therefore, the test for plain error places a *much heavier burden* upon the defendant than that imposed . . . upon defendants who have preserved their rights by timely objection. This is so in part at least because the defendant could have prevented any error by making a timely objection.

State v. Walker, 316 N.C. 33, 39, 340 S.E.2d 80, 83 (1986) (citations and internal quotation marks omitted; emphasis added). *See also State v. Pate*, 187 N.C. App. 442, 448-49, 653 S.E.2d 212, 217 (2007) ("A *reasonable possibility* of a different result at trial *is a much lower standard* than that a different result *probably* would have been reached

at trial, which is what this Court must find for there to be plain error.") (citations and internal quotation marks omitted; emphasis added).

In light of the "much lower standard" of prejudice applied in *Godwin*, *see id.*, Killian's contentions that the non-HGN evidence of his impairment was similar to the evidence in that case are inapposite. We have found no precedential case addressing plain error in the admission of HGN testimony. *But see State v. Jackson*, 237 N.C. App. 183, 767 S.E.2d 149 (2014) (unpublished), *available at* 2014 WL 5587011 (finding no error in admission of HGN evidence and discussing the overwhelming non-HGN evidence of the defendant's impairment—several traffic infractions, the odor of alcohol and marijuana, bloodshot and glassy eyes, admission by the defendant of having consumed two beers and smoked marijuana earlier in the day, and a blood alcohol level reading of 0.16 on an Intoxilyzer test—before noting in dicta that, even had the admission of the evidence been error, the Court would not have concluded the error likely altered the jury's verdict).

Here, even without the HGN testimony, the jury had before it the following evidence of Killian's impairment: Ray's observations of Killian's slurred speech, glassy, red eyes, and strong odor of alcohol; two positive breath test results; Killian's failure to successfully complete the walk and turn test and inability to attempt the one-leg stand; Killian's admission to having consumed two beers; the blood alcohol test results indicating legal impairment with a BAC of 0.10; and a recording from Ray's dashboard camera of his entire roadside encounter with Killian. In light of this significant evidence of impairment, we are not persuaded that, had Ray's testimony about the HGN test results not been admitted, the jury probably would have reached a different result. In our view, Killian's is not the "truly exceptional case[]. . . . [where] the error in question tilted the scales and caused the jury to reach its verdict convicting the defendant." *See Walker*, 316 N.C. at 39, 340 S.E.2d at 83 (citations and internal quotation marks omitted). Accordingly, he is not entitled to a new trial.

NO PREJUDICIAL ERROR.

Judges BYRANT and DILLON concur.

STATE v. LOFTIS

[250 N.C. App. 449 (2016)]

STATE OF NORTH CAROLINA
v.
CHARLES MICHAEL LOFTIS

No. COA16-65

Filed 15 November 2016

Appeal and Error—driving while impaired—motion to suppress granted—State's failure to timely file writ of certiorari

In an impaired driving case, where defendant's motion to suppress was granted and the State delayed filing its petition for a writ of certiorari beyond the date that the case was calendared for its final hearing, it was proper for the district court to dismiss the charge sua sponte because the State failed to dismiss the charge. In addition, when the State appealed the district court's dismissal, the superior court did not err when it dismissed the State's appeal because the State's notice of appeal did not specify a basis for its appeal.

Appeal by the State from order entered 23 September 2015 by Judge Milton F. Fitch, Jr., in Pitt County Superior Court. Heard in the Court of Appeals 11 August 2016.

Attorney General Roy Cooper, by Assistant Attorney General Christopher W. Brooks, for the State.

The Robinson Law Firm, P.A., by Leslie S. Robinson, for defendant-appellee.

McCULLOUGH, Judge.

The State appeals from the superior court's order dismissing the State's appeal and, in the alternative, affirming the district court's dismissal of the case. The State also filed a petition for writ of certiorari ("PWC") seeking review of the grant of Charles Michael Loftis' ("defendant") motion to suppress. For the following reasons, we affirm the superior court and deny the State's PWC.

I. Background

On 15 September 2012, Brittany Jefferson attempted to enter the drive-thru lane at a Burger King in Greenville, North Carolina when another vehicle cut her off. Ms. Jefferson honked her horn at the vehicle as she had to brake quickly to avoid a collision. The operator of the

other vehicle, later identified as defendant, leaned out the window and yelled obscenities at her. Based on defendant's behavior, Ms. Jefferson believed defendant was impaired. Ms. Jefferson then called 911, provided the operator her name and phone number, and reported what had just occurred. Officer Clarence Jordan with the Greenville Police Department was across the street from the Burger King and received the call regarding a silver Jeep at the Burger King. He observed a silver Jeep leave the Burger King and followed the car down Memorial Drive. While following the Jeep, Officer Jordan observed defendant move abruptly into the far right lane and make a wide right turn, "like a tractor-trailer turn" onto Regency Drive. At that time, Officer Jordan initiated a traffic stop which resulted in defendant being cited for driving while impaired in violation of N.C. Gen. Stat. § 20-138.1.

On 26 November 2012, defendant filed a motion to suppress the results of breath tests in which he provided breath samples indicating a blood alcohol level over the legal limit and a motion to suppress evidence on the ground that there was no reasonable or articulable suspicion to stop his vehicle. Defendant also filed a motion to dismiss the impaired driving charge on 10 March 2014 alleging double jeopardy after the driver's license was revoked as a civil penalty.

Defendant's motion to suppress the stop was heard in Pitt County District Court before the Honorable Lee Teague on 18 November 2014. The district court issued a "pre-trial indication" pursuant to N.C. Gen. Stat. § 20-38.6(f) on 19 November 2014 in which it concluded that "there was not reasonable suspicion to stop the [d]efendant's vehicle and [d]efendant's motion should be preliminarily granted." The State gave oral notice of appeal when the district court announced its decision and then filed notice of appeal from the pre-trial indication on 24 November 2014. The matter was heard in Pitt County Superior Court on 25 March 2015 by the Honorable Walter H. Godwin. After the hearing, the superior court affirmed the district court's pre-trial indication. In an order signed on 4 May 2015 and filed on 15 May 2015, the superior court judge concluded "[the officer] did not have a reasonable or articulable suspicion to stop defendant's motor vehicle and the District Trial Court was correct when it preliminarily granted his *Motion to Suppress Evidence*." The case was then remanded to district court.

On 2 June 2015, the State moved to continue the case. The district court allowed the State's motion and continued the case until 16 June 2015, indicating it was the last continuance for the State by checking item number twelve on the order, which reads "Last Continuance For the," and circling "State."

When the case was later called on 16 June 2015, the State requested another continuance so that it could petition this Court pursuant to a writ of certiorari for review of the order granting defendant's motion to suppress. The district court judge denied the State's motion to continue and signed and filed the final order of suppression on 16 June 2015. The district court judge then directed the State to call the case or move to dismiss defendant's case. When the State refused to take any action, the district court, on its own motion, dismissed the case based on the State's failure to prosecute.

On 22 June 2015, the State appealed the district court's dismissal of the case to superior court. On 31 July 2015, defendant filed a motion to dismiss the State's appeal and a response to the State's appeal.

The State's appeal was heard in Pitt County Superior Court on 31 July 2015 by the Honorable Milton Fitch, Jr. Following the hearing, Judge Fitch granted defendant's motion to dismiss the State's appeal and, in the alternative, affirmed the district court's dismissal of the case after entry of the suppression order. The order was signed on 8 August 2015 and filed on 23 September 2015.

The State filed notices of appeal from Judge Fitch's order on 29 and 30 September 2015. On 18 February 2016, the State petitioned this Court for writ of certiorari requesting that this Court review the grant of defendant's motion to suppress.

II. Discussion

The procedural history recited above is important as we must examine what issue is before us. The State finally filed its PWC on 18 February 2016 and requests that this Court ignore the procedural history by going to the merits of this traffic stop case. In our discretion, we decline to grant the writ and address the merits as we believe to do so would indicate that the State is exempt from the district court's decision on when a case is to be heard and would imply that granting a continuance motion but indicating that it is the "last continuance" is inapplicable to the State.

In the case at bar, the State is no doubt frustrated with the district and superior court rulings on defendant's motion to suppress. Nevertheless, the State had an avenue to challenge these rulings which the State perceives to be erroneous. While the State may not appeal the superior court's affirmance under N.C. Gen. Stat. § 20-38.7, *see State v. Fowler*, 197 N.C. App. 1, 11, 696 S.E.2d 523, 535 (2009), *disc. review denied and appeal dismissed*, 364 N.C. 129, 676 S.E.2d 695 (2010), and *State v. Palmer*, 197 N.C. App. 201, 203, 676 S.E.2d 559, 561 (2009), *disc. review*

denied and appeal dismissed, 363 N.C. 810, 692 S.E.2d 394 (2010), the State could have proceeded with a PWC. *See State v. Osterhoudt*, 222 N.C. App. 620, 626, 731 S.E.2d 454, 458 (2012). Of this the State was well aware, and in fact, had informed the district court and opposing counsel of its intent to do so as early as 2 June 2015.

Although the State had the transcript of the superior court hearing by 17 April 2015, the superior court's suppression order was filed by 15 May 2015, and the State indicated its intention to file a petition by 2 June 2015, no action was taken before the case was called on 16 June 2015. It should be noted that the "last continuance" to 16 June 2015 was over defense counsel's objection and an examination of the record reveals that this case had already been continued over fifteen times at the request of either the defense, the court, or the State.

The issue before this Court, however, is not the district court's denial of the State's motion to continue the case on 16 June 2015. The matter on appeal is the correctness of the superior court's 23 September 2015 order dismissing the State's appeal and, in the alternative, affirming the district court's dismissal of the case. These matters are issues of law, which this Court reviews *de novo*.

The Criminal Procedure Act provides that the State may appeal a district court ruling that dismisses criminal charges to the superior court unless the rule against double jeopardy prohibits further prosecution. N.C. Gen. Stat. § 15A-1432(a) (2015).

> When the State appeals pursuant to [N.C. Gen. Stat. § 15A-1432(a)] the appeal is by written motion specifying the basis of the appeal made within 10 days after the entry of the judgment in the district court. The motion must be filed with the clerk and a copy served upon the defendant.

N.C. Gen. Stat. § 15A-1432(b) (2015).

In the present case, the State's notice of appeal from the district court to the superior court stated that it was appealing the district court's decision, but did not otherwise specify any basis for its appeal. In full, the State's notice of appeal reads as follows:

> NOW COMES THE STATE OF NORTH CAROLINA, by the undersigned Assistant District Attorney and pursuant to North Carolina General Statute § 15A-1432, gives notice of appeal to the Superior Court from the written Order of the Honorable Lee Teague, District Court Judge Presiding, dated June 16, 2015. By its order, the court dismissed, the

> Driving While Impaired charge against the above named defendant after denying the State's motion to continue the case during a criminal session of District Court on June 16, 2015.

While this Notice may be sufficient for an appeal to this Court, as provided in N.C. Gen. Stat. § 15A-132(b), the State is required to specify the basis for its appeal to the superior court. An appeal under this statute requires more specificity than merely identifying the order which is being appealed. *See State v. Hinchman*, 192 N.C. App. 657, 662, 666 S.E.2d 199, 202 (2008); *State v. Hamrick*, 110 N.C. App. 60, 64, 428 S.E.2d 830, 832 (1993). For this reason alone, we believe Judge Fitch acted properly in granting defendant's motion to dismiss the State's appeal.

Yet, addressing the superior court's alternative ruling, we still affirm the decision. Undoubtedly the District Attorney was in an awkward positon when the case was called on 16 June 2015 after defendant's motion to suppress was granted. This case posture, however, had been foreseen by the North Carolina State Bar (the "Stare Bar") which issued a Formal Ethics Opinion in 2009. That Opinion reads as follows:

> A lawyer has an ethical duty, under Rule 3.1, not to bring a proceeding unless there is a basis in law and in fact for doing so that is not frivolous. In light of this duty, a prosecutor who knows that she has no admissible evidence supporting a DWI charge to present at trial must dismiss the charge prior to calling the case for trial.

2009 N.C. Eth. Op. 15 (N.C. St. Bar.), *available at* 2010 WL 610308.

The State found itself in this position by its own inaction. Having had the transcript since 17 April 2015, having had the order affirming the district court's pre-trial indication since 15 May 2015, and having stated its intention to file a PWC on 2 June 2015, but not having filed any petition by 16 June 2015, the State was obligated to move to dismiss. In the case *sub judice*, the State did nothing. The Assistant District Attorney refused to call the case and ultimately the court dismissed this case pursuant to its inherent power to manage its own docket, a right we have frequently recognized. *See Simeon v. Hardin*, 339 N.C. 358, 451 S.E.2d 858 (1994) (the district attorney may prepare the calendar, but the court holds ultimate authority over dockets).

While the State argues that the dismissal was not permissible under N.C. Gen. Stat. § 15A-954, that statute was not relied upon by the court as it applies only to motions by defense counsel; although, had

defendant moved for a dismissal pursuant to N.C. Gen. Stat. § 15A-954, dismissal could have been based on N.C. Gen. Stat. § 15A-954(a)(7), which provides:

> (a) The court on motion of the defendant must dismiss the charges stated in a criminal pleading if it determines that:
>
> . . . .
>
> (7) An issue of fact or law essential to a successful prosecution has been previously adjudicated in favor of the defendant in a prior action between the parties.

N.C. Gen. Stat. § 15A-954(a)(7) (2015).

III. Conclusion

In this case, we conclude that the State delayed filing its petition for a writ of certiorari beyond the date that the case was calendared for its final hearing. As the State failed to dismiss the charge, as it is required to do pursuant to the State Bar's Formal Ethics Opinion, it was proper for the district court to dismiss the charge *sua sponte*. Moreover, when the State appealed the district court's dismissal, the notice of appeal did not specify a basis for its appeal. Consequently, the superior court did not err when it dismissed the appeal and in the alternative, affirmed the district court's dismissal of the case.

AFFIRMED.

Judges STEPHENS and ZACHARY concur.

STATE v. WATSON

[250 N.C. App. 455 (2016)]

STATE OF NORTH CAROLINA
v.
RODNEY EDWARD WATSON, DEFENDANT

No. COA16-184

Filed 15 November 2016

Search and Seizure—tip from confidential informant—suspicious packages—shipped from Arizona with Utah return address

Where Clayton Police Department officers received a tip from a confidential informant regarding suspicious packages that defendant had retrieved from a local UPS store and, based on that tip, officers intercepted defendant's vehicle and discovered illegal drugs inside the packages, the trial court erred in denying defendant's motion to suppress. The only suspicious factor found by the trial court was the Utah return address on the packages shipped from Arizona, and that factor alone was not sufficient to support the trial court's conclusion that the police had reasonable suspicion to detain defendant.

Appeal by Defendant from judgments entered 21 August 2015 by Judge Thomas H. Lock in Johnston County Superior Court. Heard in the Court of Appeals 23 August 2016.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General Adren L. Harris, for the State.

Richard Croutharmel for the Defendant.

DILLON, Judge.

Rodney Edward Watson ("Defendant") appeals from the trial court's judgments convicting him of several drug-related offenses and declaring him a habitual felon. Specifically, he seeks review of the trial court's denial of his motion to suppress. For the following reasons, we vacate the judgments and remand for further proceedings consistent with this opinion.

I. Background

Officers with the Clayton Police Department received a tip from a confidential informant regarding "suspicious" packages that Defendant had retrieved from a local UPS store. Based on this tip, the police intercepted Defendant's vehicle a short distance from the UPS store. During

the traffic stop, police conducted a canine sniff, which led to the discovery of illegal drugs inside the packages.

Defendant moved to suppress the drug evidence, contending that the police lacked reasonable suspicion to initiate the traffic stop. The trial court denied Defendant's motion. A jury subsequently convicted Defendant. On the basis of this conviction, Defendant pled guilty to habitual felon status. Defendant gave oral notice of appeal.

II. Standard of Review

On appeal, Defendant challenges the trial court's order denying his motion to suppress. We review the order with the objective of "determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). Conversely, a "trial court's conclusions of law . . . are fully reviewable on appeal." *State v. Hughes*, 353 N.C. 200, 208, 539 S.E.2d 625, 631 (2000).

III. Analysis

Defendant contends that the trial court's findings were not sufficient to support its conclusion that the officer had reasonable suspicion to stop Defendant's vehicle. We agree.

Before initiating a warrantless stop, a police officer must "have reasonable and articulable suspicion of criminal activity." *Hughes*, 353 N.C. at 206–07, 539 S.E.2d at 630. But if a stop is lacking in reasonable suspicion, any evidence generated from the stop is generally deemed inadmissible under the exclusionary rule. *See State v. McKinney*, 361 N.C. 53, 58, 637 S.E.2d 868, 872 (2006) ("In short, evidence obtained in violation of an individual's Fourth Amendment rights cannot be used by the government to convict him or her of a crime."). An informant's tip may supply reasonable suspicion if the information provided reliably describes the suspect *and* establishes criminal activity. *Hughes*, 353 N.C. at 209, 539 S.E.2d at 632. Quoting the United States Supreme Court, our Supreme Court has stated:

> [A]n accurate description of a subject's readily observable location and appearance is of course reliable in this limited sense: It will help the police correctly identify the person whom the tipster means to accuse. Such a tip, however, does not show that the tipster has knowledge of concealed

> criminal activity. *The reasonable suspicion here at issue requires that a tip be reliable* in its assertion of illegality, not just in its tendency to identify a determinable person.

Id. (emphasis added) (quoting *Florida v. J.L.*, 529 U.S. 266, 272 (2000)).

Here, the trial court found as follows: The informant, a Clayton UPS store employee, had been trained to detect narcotics. The informant had successfully notified the police about packages later found to contain illegal narcotics. These tips were used to secure a number of felony drug convictions.

On the day in question, the informant advised the police that a man, later identified as Defendant, had arrived at the UPS store in a truck and retrieved four packages with a Utah return address *when in fact* the packages had been sent from Arizona. Specifically, the trial court found as follows regarding the informant's tip:

> The Confidential Informant informed [the officer] that the four packages had been shipped from Tuscan [sic], Arizona yet the address on the package stated it was shipped from Ogden, Utah.
>
> The Confidential Informant stated to [the officer] that a black male and a black female operating a black Chevrolet truck were the individuals picking up the four suspicious packages. The Confidential Informant provided the license plate number of the Chevrolet truck to [the officer].

After receiving the tip, police arrived at the UPS store, observed Defendant driving away, and initiated a traffic stop.[1]

We believe that based on the previous experience with the informant, the police acted reasonably in relying on the informant's tip to conclude that Defendant had retrieved packages with Arizona shipping addresses which were in fact shipped from Utah. A return address on a package which differs from the package's actual city of origin is a legitimate factor in a trial court's reasonable suspicion calculus. Still, there is nothing *illegal* about receiving a package with a return address which

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1. The parties concede that Defendant was seized during his encounter with the police officer as the officer's conduct "would have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business." *State v. Icard*, 363 N.C. 303, 308, 677 S.E.2d 822, 826 (2009) (internal quotation marks omitted).

differs from the actual shipping address. Indeed, there are a number of innocent explanations for why this could have occurred. For instance, here, the packages could have been sent by a Utah resident while vacationing in Arizona.

We recognize that innocent factors, when considered together, may give rise to reasonable suspicion. *See United States v. Sokolow*, 490 U.S. 1, 9 (1989). Courts have found reasonable suspicion on the basis of a number of innocent factors, including a suspicious return address. However, we are not aware of any case where a court has determined the existence of reasonable suspicion based *solely* on a suspicious return address. Rather, other additional factors have always factored in this calculus. These factors have included (1) the size and shape of the mailing; (2) whether the package is taped to seal all openings; (3) whether the mailing labels are handwritten; (4) whether the return address is fictitious; (5) unusual odors from the package; (6) whether the city of origin is a common "drug source" locale; and (7) whether there have been repeated mailings involving the same sender and addressee. *United States v. Alexander*, 540 F.3d 494, 501, 501 n.2 (6th Cir. 2008) (citations omitted).

In the present case, the only suspicious factor found by the trial court was the Utah return address on the packages shipped from Arizona. The trial court made no finding that the informant or the police had any prior experience with Defendant. The trial court made no finding that Tucson, the city of origin, was a known "drug source" locale. *See State v. Cooper*, 163 Vt. 44, 47, 652 A.2d 995, 997 (1994) (affirming trial court's finding of reasonable suspicion, in part, because Tucson is a known drug source locale). The trial court made no finding that the packages were sealed suspiciously, had a suspicious weight based on their size, had handwritten labels, or had a suspicious odor. *Id.*; *United States v. Lux*, 905 F.2d 1379, 1380 n.1, 1382 (10th Cir. 1990) (finding that there was reasonable suspicion to detain defendant as the package fit part of the "drug package profile"). Therefore, we hold that the trial court's findings in this case are insufficient to support its conclusion that the police had reasonable suspicion to stop Defendant. As such, the retrieved drug evidence was inadmissible under the exclusionary rule. *See McKinney*, 361 N.C. at 58, 637 S.E.2d at 872. Because the drug evidence was inadmissible, we also find that Defendant's habitual felon conviction was erroneous.

IV. Conclusion

Because we hold that the trial court did not make sufficient findings to support its conclusion that the police had reasonable suspicion

to detain Defendant, we reverse the order denying Defendant's motion to suppress, vacate the judgments, and remand for further proceedings consistent with this opinion.

REVERSED.

Judges BRYANT and STEPHENS concur.

TOWN OF BELHAVEN, NC; AND THE NORTH CAROLINA NAACP STATE CONFERENCE OF BRANCHES, THE HYDE COUNTY NAACP BRANCH, AND THE BEAUFORT COUNTY NAACP BRANCH, PLAINTIFFS[1]

v.

PANTEGO CREEK, LLC; AND VIDANT HEALTH, INC., DEFENDANTS

No. COA16-373

Filed 15 November 2016

1. Deeds—wish for land to be used for hospital—no reversionary interest

Where the Town of Belhaven recorded a deed in 1948 granting a 100-foot strip of land to the Pungo District Hospital Corporation (PDHC), PDHC thereafter constructed a hospital on the land, PDHC in 2011 entered an agreement transferring full control of PDHC to Vidant Health, Inc. (Vidant), Vidant closed the hospital in 2014 and deeded it to Pantego Creek, LLC (Pantego Creek), and plaintiffs (Belhaven, the Pungo District Hospital Community Board, and several NAACP branches) filed a complaint against defendants (Pantego Creek and Vidant), the trial court did not err by granting defendants' motion to dismiss pursuant to Rule 12(b)(6) as to Belhaven's breach of contract claim against Vidant and by failing to enter declaratory judgment against Vidant and Pantego Creek. The Court of Appeals rejected plaintiffs' argument that defendants were successors in interest to the 1948 deed and therefore subject to language included therein that amounted to a reversionary interest held by Belhaven that the granted property be used for the operation of a hospital for the benefit of the town. Belhaven did not include any language creating a reversionary interest in the 1948 deed—and language expressing Belhaven's wishes did not create such an interest—and

1. Although not included in the caption of the trial court's order, Pungo District Hospital Community Board, Inc. is also a plaintiff in this case.

the deed gave PDHC and its successors in interest a title in fee simple absolute.

2. Fraud—mediation agreement—not beneficiaries to agreement—no particularity in allegations

Where the Town of Belhaven recorded a deed in 1948 granting a 100-foot strip of land to the Pungo District Hospital Corporation (PDHC), PDHC thereafter constructed a hospital on the land, PDHC in 2011 entered an agreement transferring full control of PDHC to Vidant Health, Inc. (Vidant), Vidant closed the hospital in 2014 and deeded it to Pantego Creek, LLC (Pantego Creek), and plaintiffs (Belhaven, the Pungo District Hospital Community Board, and several NAACP branches) filed a complaint against defendants (Pantego Creek and Vidant), the trial court did not err by granting defendants' motion to dismiss pursuant to Rule 12(b)(6) as to plaintiffs' claim against Vidant for fraud. Belhaven breached the mediation agreement when its community board was unable to assume operational responsibility for the hospital, so Vidant was entitled to close the hospital according to the mediation agreement. In addition, plaintiffs were not parties or third-party beneficiaries to the 2011 agreement and 2014 deed between Vidant, PDHC, and Pantego Cree, and therefore plaintiffs were incapable of suffering damages based on the 201 agreement or 2014 deed. Futher, plaintiffs failed to allege with any particularity how Vidant's exercise of its express option to close the hospital contained in the mediation agreement constituted fraud.

3. Unfair Trade Practices—failure to allege fraud or deception—no business relationship

Where the Town of Belhaven recorded a deed in 1948 granting a 100-foot strip of land to the Pungo District Hospital Corporation (PDHC), PDHC thereafter constructed a hospital on the land, PDHC in 2011 entered an agreement transferring full control of PDHC to Vidant Health, Inc. (Vidant), Vidant closed the hospital in 2014 and deeded it to Pantego Creek, LLC (Pantego Creek), and plaintiffs (Belhaven, the Pungo District Hospital Community Board, and several NAACP branches) filed a complaint against defendants (Pantego Creek and Vidant), the trial court did not err by granting defendants' motion to dismiss pursuant to Rule 12(b)(6) as to Belhaven's and the Community Board's unfair and deceptive trade practices claim against Vidant. Belhaven and the Community Board failed to allege any fraud or deception on the part of Vidant. Further, there was no business relationship between Vidant and plaintiffs.

4. Fiduciary Relationship—alleged—agreement not intended for benefit of third parties

Where the Town of Belhaven recorded a deed in 1948 granting a 100-foot strip of land to the Pungo District Hospital Corporation (PDHC), PDHC thereafter constructed a hospital on the land, PDHC in 2011 entered an agreement transferring full control of PDHC to Vidant Health, Inc. (Vidant), Vidant closed the hospital in 2014 and deeded it to Pantego Creek, LLC (Pantego Creek), and plaintiffs (Belhaven, the Pungo District Hospital Community Board, and several NAACP branches) filed a complaint against defendants (Pantego Creek and Vidant), the trial court did not err by granting defendants' motion to dismiss pursuant to Rule 12(b)(6) as to Belhaven's breach of fiduciary duty claim against Pantego Creek. By the 2011 agreement's plain terms, it was not intended for the benefit of third-party beneficiaries and was exclusively between Pantego Creek, PDHC, and Vidant. No fiduciary relationship ever existed between Pantego Creek and plaintiffs.

5. Civil Rights—Section 99D-1 claim—standing—only individuals or Human Relations Commission

Where the Town of Belhaven recorded a deed in 1948 granting a 100-foot strip of land to the Pungo District Hospital Corporation (PDHC), PDHC thereafter constructed a hospital on the land, PDHC in 2011 entered an agreement transferring full control of PDHC to Vidant Health, Inc. (Vidant), Vidant closed the hospital in 2014 and deeded it to Pantego Creek, LLC (Pantego Creek), and plaintiffs (Belhaven, the Pungo District Hospital Community Board, and several NAACP branches) filed a complaint against defendants (Pantego Creek and Vidant), the trial court did not err by granting defendants' motion to dismiss pursuant to Rule 12(b)(6) as to the NAACP's Section 99D-1 claim against defendants. The General Assembly only intended individually aggrieved persons or the North Carolina Human Relations Commission to have standing to bring an action under Section 99D-1.

6. Jurisdiction—Rule 2.1 of General Rules of Practice for Superior and District Courts—designation as exceptional case

Where the Town of Belhaven recorded a deed in 1948 granting a 100-foot strip of land to the Pungo District Hospital Corporation (PDHC), PDHC thereafter constructed a hospital on the land, PDHC in 2011 entered an agreement transferring full control of PDHC to Vidant Health, Inc. (Vidant), Vidant closed the hospital in 2014

and deeded it to Pantego Creek, LLC (Pantego Creek), and plaintiffs (Belhaven, the Pungo District Hospital Community Board, and several NAACP branches) filed a complaint against defendants (Pantego Creek and Vidant), the Court of Appeals found meritless and granted defendants' motion to dismiss plaintiffs' argument that the Senior Resident Superior Court Judge for the Second Judicial District and the Chief Justice of the Supreme Court of N.C. deprived plaintiffs of their right to a fair and impartial hearing when the Chief Justice designated the case as an exceptional case under Rule 2.1 of the General Rules of Practice for the Superior and District Courts upon the formal recommendation of the Senior Resident Superior Court Judge for the Second Judicial District and appointed Judge Albright to adjudicate the matter.

Appeal by Plaintiffs from order entered 13 October 2015 by Judge R. Stuart Albright in Beaufort County Superior Court. Heard in the Court of Appeals 19 October 2016.

Alan McSurely for plaintiffs-appellants the North Carolina NAACP State Conference of Branches, the Hyde County NAACP Branch, and the Beaufort County NAACP Branch.

C. Scott Holmes for plaintiff-appellants Town of Belhaven, NC and Pungo District Hospital Community Board, Inc.

K&L Gates LLP, by Gary S. Qualls, Kathryn F. Taylor, Susan K. Hackney, and Steven G. Pine, for defendant-appellee University Health Systems of Eastern Carolina, Inc. d/b/a Vidant Health, Inc.

Sumrell, Sugg, Carmichael, Hicks and Hart, P.A., by Scott C. Hart, Arey W. Grady, and Frederick H. Bailey, III, for defendant-appellee Pantego Creek, LLC.

ENOCHS, Judge.

The Town of Belhaven, North Carolina, the Pungo District Hospital Community Board, Inc., the NAACP State Conference of Branches, the Hyde County NAACP Branch, and the Beaufort County NAACP Branch (collectively "Plaintiffs") appeal from the trial court's order granting Pantego Creek, LLC's and Vidant Health, Inc.'s (collectively "Defendants") motion to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. After careful review, we affirm the trial court's order.

Factual Background

On 21 January 1948, the Town of Belhaven ("Belhaven"), located in Beaufort County, North Carolina, recorded a deed granting the Pungo District Hospital Corporation ("PDHC") a 100 foot strip of land ("the 1948 Deed"). The deed provided, in pertinent part, as follows:

> THIS DEED, MADE this the 20th day of January, 1948, by Town of Belhaven, a municipal corporation of the State of North Carolina, hereinafter designated as party of the first part, to Pungo District Hospital Corporation, hereinafter designated as party of the second part,
>
> WITNESSETH: That the party of the first part, in consideration of the benefits to be derived by the citizens of the Town of Belhaven from the construction and operation of a hospital on the property hereinafter described and pursuant to the authority granted by Chapter 659 of the Session Laws of 1947, has given, granted, bargained, sold and does hereby convey unto the party of the second part that certain lot or parcel of land in the Town of Belhaven, Beaufort County, North Carolina, particularly described as follows:
>
> That portion of Allen Street in said Town of Belhaven 100 feet in width extending from Front or [sic] Water Street Southwardly to Pantego Creek, reference being made to the map made by Norfolk Southern Railroad Company for a more accurate description thereof.
>
> TO HAVE AND TO HOLD the said piece or parcel of land, together with all and singular, the rights, ways, privileges and appurtenances thereto belonging or in anywise appertaining unto the party of the second part, its successors and assigns in fee simple, in as full and ample manner as the party of the first part is authorized and empowered to convey the same.

After recordation, PDHC constructed Pungo District Hospital ("the Hospital") on the land conveyed in the 1948 Deed. PDHC then managed and operated the Hospital until 2011.

In 2011, PDHC entered into an agreement ("the 2011 Agreement") with University Health Systems of Eastern Carolina, Inc., d/b/a Vidant Health, Inc. ("Vidant") and Pantego Creek, LLC ("Pantego Creek") — which was formed on 28 September 2011 by PDHC — transferring full

control of PDHC to Vidant. Pursuant to the 2011 Agreement, Pantego Creek was vested with the right to prosecute any breach of the 2011 Agreement by Vidant. The 2011 Agreement also expressly stated that "The Parties agree that this Agreement and all of the Transaction Agreements are not intended to be third party beneficiary agreements."

In September 2013, Vidant announced that it intended to close the Hospital. In response, Belhaven and the NAACP State Conference of Branches, the Hyde County NAACP Branch, and the Beaufort County NAACP Branch (collectively "the NAACP"), publicly denounced closure of the Hospital. Thereafter, the Mayor of Belhaven, the NAACP, and Vidant met on several occasions to discuss concerns surrounding the Hospital's imminent closure.

As a result of these meetings, the NAACP, Belhaven, and Vidant entered into a written agreement ("the Mediation Agreement") charging Belhaven with creating the Pungo District Hospital Community Board, Inc. ("Community Board"). The Mediation Agreement also stated the following: "In the event that the [Community Board] is unable to assume operational responsibility for the hospital for whatever reason on July 1, 2014, the Hospital will be closed[.]"

Belhaven failed to comply with the Mediation Agreement's terms when the Community Board failed to meet the 1 July 2014 deadline. As a result, Vidant closed the Hospital on 1 July 2014 and deeded the associated real property to Pantego Creek (the "2014 Deed").

Plaintiffs filed a complaint and motion for a temporary restraining order on 13 August 2014 in Beaufort County Superior Court. The following day, the Honorable Milton F. Fitch granted Plaintiffs' motion for a temporary restraining order. The case was thereafter removed to the United States District Court for the Eastern District of North Carolina. On 18 March 2015, the Honorable James C. Dever, III remanded the case to Beaufort County Superior Court on the ground that Plaintiffs had not actually brought a federal civil rights claim under Title VI of the Federal Civil Rights Act of 1964, but rather had alleged civil rights violations under N.C. Gen. Stat. § 99D-1 (2015).

On 6 April 2015, Plaintiffs filed their first amended complaint in Beaufort County Superior Court. The complaint set forth the following six causes of action: (1) breach of contract against Vidant as successor in interest to the 1948 Deed by Belhaven; (2) declaratory judgment against Defendants for breaching the 1948 Deed's terms by Belhaven; (3) fraud against Vidant; (4) unfair and deceptive trade practices against Vidant by Belhaven and the Community Board; (5) breach of fiduciary

duty against Pantego Creek by Belhaven; and (6) Section 99D-1 claim against Defendants by the NAACP.

On 30 April 2015, Senior Resident Superior Court Judge Wayland J. Sermons, Jr. sent a formal letter to Chief Justice Mark Martin of the North Carolina Supreme Court, copied to counsel for all parties, recommending that the case be designated as exceptional and that Chief Justice Martin assign a judge to the case in his absolute discretion. On 7 May 2015, Chief Justice Martin entered an order designating the case as exceptional pursuant to Rule 2.1 of the General Rules of Practice for the Superior and District Courts and appointing the Honorable R. Stuart Albright to adjudicate the matter.

On 10 July 2015, Defendants filed a motion to dismiss Plaintiffs' first amended complaint pursuant to Rule 12(b)(6) for failure to state a claim upon which relief could be granted. Defendants attached the following documents to their motion: (1) the 2011 Agreement and related documentation thereto; (2) the Mediation Agreement; (3) an email from the president and CEO of Vidant to the Mayor of Belhaven incorporated by reference in Plaintiffs' complaint; and (4) the 1948 Deed.[2]

A hearing on Defendants' motion was held before Judge Albright on 6 October 2015 in Beaufort County Superior Court. On 13 October 2015, Judge Albright entered an order granting Defendants' motion to dismiss. Plaintiffs entered notice of appeal on 10 November 2015.

Analysis

I. Motion to Dismiss

On appeal, Plaintiffs contend that the trial court erred in granting Defendants' motion to dismiss. Specifically, they assert that they pled sufficient factual allegations to advance each of their claims. We disagree.

> "The standard of review of an order granting a 12(b)(6) motion is whether the complaint states a claim for which relief can be granted under some legal theory when the complaint is liberally construed and all the allegations

2. Plaintiffs briefly argue that the trial court erred by considering these documents without converting Defendants' motion to dismiss into a motion for summary judgment pursuant to Rule 56 of the North Carolina Rules of Civil Procedure. However, it is well settled that "[d]ocuments attached as exhibits to the complaint and incorporated therein by reference are properly considered when ruling on a 12(b)(6) motion." *Woolard v. Davenport*, 166 N.C. App. 129, 133-34, 601 S.E.2d 319, 322 (2004).

> included therein are taken as true. On a motion to dismiss, the complaint's material factual allegations are taken as true. Dismissal is proper when one of the following three conditions is satisfied: (1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim. On appeal of a 12(b)(6) motion to dismiss, this Court conducts a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct."

Podrebarac v. Horack, Talley, Pharr, & Lowndes, P.A., 231 N.C. App. 70, 74, 752 S.E.2d 661, 663-64 (2013) (quoting *Burgin v. Owen*, 181 N.C. App. 511, 512, 640 S.E.2d 427, 428-29 (2007)). We address each of Plaintiffs' claims in turn.

A. Breach of Contract and Declaratory Judgment

[1] Plaintiffs argue that because Defendants were successors in interest to the 1948 Deed they were subject to language included therein which amounted to a reversionary interest held by Belhaven that the granted property be used for the operation of a hospital for the benefit of the citizens of the town. They maintain that the trial court erred in dismissing Belhaven's breach of contract claim against Vidant and by failing to enter declaratory judgment against Vidant and Pantego Creek.

Plaintiffs assert that Article V, Section 3 of the North Carolina Constitution mandates that taxes shall only be levied for public purposes and contend that the subject land conveyed in the 1948 Deed can therefore never be used for anything other than for the operation of a hospital because it was conveyed by the Town of Belhaven — a governmental entity — to PDHC. Consequently, they argue that the closure of the Hospital would extinguish the land's use for a public purpose and, in turn, run afoul of Article V, Section 3.

The fundamental flaw with Plaintiffs' position is that Belhaven did not include any language creating a reversionary interest in the 1948 Deed to the effect that the land would revert to Belhaven in the event that the land ceased being used for the operation of a hospital. Instead, the language in the 1948 Deed clearly states that the land was conveyed in fee simple absolute to PDHC.

Significantly, our Supreme Court has long held that

> [t]his Court has declined to recognize reversionary interests in deeds that do not contain express and unambiguous language of reversion or termination upon condition broken.
>
> We have stated repeatedly that a mere expression of the purpose for which the property is to be used without provision for forfeiture or reentry is insufficient to create an estate on condition and that, in such a case, an unqualified fee will pass.

Station Assocs. v. Dare Cnty., 350 N.C. 367, 370-71, 513 S.E.2d 789, 792-93 (1999) (internal citations omitted).

Here, we are satisfied that the language of the 1948 Deed does nothing more than express the purpose for which Belhaven wished the subject property to be used. There does not exist any express and unambiguous reversionary interest in the deed, and indeed, to the contrary, it plainly states that PDHC is entitled "TO HAVE AND TO HOLD the said piece or parcel of land, together with all and singular, the rights, ways, privileges and appurtenances thereto belonging or in anywise appertaining unto the party of the second part, its successors and assigns *in fee simple*, in as full and ample manner as the party of the first part is authorized and empowered to convey the same." (Emphasis added).

It is well settled that

> [a] grantor can impose conditions and can make the title conveyed dependent upon a grantee's performance. But if the grantor does not make any condition, but simply expresses the motive which induces him to execute the deed, the legal effect of the granting words cannot be controlled by the language indicating the grantor's motive. It is well established that the law does not favor a construction of the language in a deed which will constitute a condition subsequent unless the intention of the parties to create such a restriction upon the title is *clearly manifested*. For a reversionary interest to be recognized, the deed must contain express and unambiguous language of reversion or termination upon condition broken. A mere expression of the purpose for which the property is to be used without provision for forfeiture or re-entry is insufficient to create an estate on condition.

Prelaz v. Town of Canton, 235 N.C. App. 147, 155, 760 S.E.2d 389, 394 (2014) (internal citations, quotation marks, and brackets omitted).

Plaintiffs cite no authority for their proposition that an implicit reversionary interest is created simply because the granting party is a governmental entity which had a public purpose in mind at the time it conveyed certain property, nor are we aware of any. Consequently, we are bound by *Station Assocs.*, *Inc.* and analogous cases requiring that for a reversionary interest to exist it must be expressly and unambiguously stated in a grant of real property. We therefore hold that no reversionary interest was created in the 1948 Deed and PDHC and its successors in interest acquired title to the subject property in fee simple absolute.

Furthermore, although unnecessary to our determination of this issue, we also note that the General Assembly has affirmatively provided that

> [i]t is the purpose of the General Assembly of the State of North Carolina to provide that if a person claims title to real property under a chain of record title for 30 years, and no other person has filed a notice of any claim of interest in the real property during the 30-year period, then all conflicting claims based upon any title transaction prior to the 30-year period shall be extinguished.

N.C. Gen. Stat. § 47B-1 (2015). Towards this end, the General Assembly has emphasized that "obsolete restrictions . . . which have been placed on the real property records at remote times in the past often constitute unreasonable restraints on the alienation and marketability of real property." N.C. Gen. Stat. § 47B-1(2). Consequently,

> (a) Any person having the legal capacity to own real property in this State, who, alone or together with his predecessors in title, shall have been vested with any estate in real property of record for 30 years or more, shall have a marketable record title to such estate in real property.
>
> (b) A person has an estate in real property of record for 30 years or more when the public records disclose a title transaction affecting the title to the real property which has been of record for not less than 30 years purporting to create such estate either in:
>
> (1) The person claiming such estate; or

> (2) Some other person from whom, by one or more title transactions, such estate has passed to the person claiming such estate;
>
> with nothing appearing of record, in either case, purporting to divest such claimant of the estate claimed.
>
> (c) Subject to the matters stated in G.S. 47B-3, such marketable record title shall be free and clear of all rights, estates, interests, claims or charges whatsoever, the existence of which depends upon any act, title transaction, event or omission that occurred prior to such 30-year period. All such rights, estates, interests, claims or charges, however denominated, whether such rights, estates, interests, claims or charges are or appear to be held or asserted by a person sui juris or under a disability, whether such person is natural or corporate, or is private or *governmental*, are hereby declared to be null and void.

N.C. Gen. Stat. § 47B-2(a)-(c) (2015) (emphasis added).

Because the 1948 Deed on its face states that it is fee simple, and since it had been held as such for over 60 years at the time of the events giving rise to the present appeal, we hold that the trial court did not err in dismissing Belhaven's breach of contract and declaratory judgment claims on this ground as well. Any argument that Defendants somehow violated the North Carolina Constitution when title was transferred to Vidant and then to Pantego Creek is foreclosed by the fact that they acquired fee simple absolute title from their predecessor in interest, PDHC, who also enjoyed title in fee simple as a result of the 1948 Deed's express provisions as discussed above *and* the fact that they had held it for well over the 30 year time period delineated in N.C. Gen. Stat. §§ 47B-1 and 47B-2. Consequently, Plaintiffs' arguments on this issue are overruled.

B. Fraud

[2] Plaintiffs next contend that the trial court erred in dismissing their claim against Vidant for fraud. We disagree.

> The well-recognized elements of fraud are 1) a false representation or concealment of a material fact, 2) reasonably calculated to deceive, 3) made with intent to deceive, 4) which does in fact deceive, and which 5) results in damage to the injured party. A complaint charging fraud must

> allege these elements with particularity. In pleading actual fraud, the particularity requirement is met by alleging time, place and content of the fraudulent representation, identity of the person making the representation and what was obtained as a result of the fraudulent acts or representations. Dismissal of a claim for failure to plead with particularity is proper where there are no facts whatsoever setting forth the time, place, or specific individuals who purportedly made the misrepresentations.

Bob Timberlake Collection, Inc. v. Edwards, 176 N.C. App. 33, 39, 626 S.E.2d 315, 321 (2006) (internal citations, quotation marks, and brackets omitted).

Significantly, the Mediation Agreement expressly stated that "In the event that the [Community Board] is unable to assume operational responsibility for the hospital for whatever reason on July 1, 2014, the Hospital will be closed[.]" Belhaven breached the Mediation Agreement when the Community Board was unable to legally assume control of the Hospital on 1 July 2014 and Plaintiffs do not contend otherwise. Therefore, in complete accord with the agreement, Vidant closed the Hospital as it was entitled to. The NAACP and Belhaven fully acquiesced to this portion of the agreement to which they are signatories. "In North Carolina, parties to a contract have an affirmative duty to read and understand a written contract before they sign it." *Westmoreland v. High Point Healthcare Inc.*, 218 N.C. App. 76, 83, 721 S.E.2d 712, 718 (2012); *see Raper v. Oliver House, LLC*, 180 N.C. App. 414, 421, 637 S.E.2d 551, 555 (2006) (" 'Persons entering contracts . . . have a duty to read them and ordinarily are charged with knowledge of their contents.' " (quoting *Nationwide Mut. Ins. Co. v. Edwards*, 67 N.C. App. 1, 8, 312 S.E.2d 656, 661 (1984))).

Plaintiffs' agreement that Vidant could close the Hospital on 1 July 2014 was plain, clear, and unambiguous. Their attempt to allege fraud in their complaint does not address the import of this provision, but rather simply states that "[a]t the time Vidant made these representations, it was secretly implementing its plans to permanently close the [Hospital], convey the property to a small group of people who controlled the Pantego Creek, LLC, pay its agents to demolish the [Hospital], and to build clinics nearby to compete with the re-opened hospital."

Such a broad unparticularized allegation, despite ignoring the provision of the Mediation Agreement that "[i]n the event that the [Community Board] is unable to assume operational responsibility for

the hospital for whatever reason on July 1, 2014, the Hospital will be closed" additionally violates the pleading requirements of Rule 9(b) of the North Carolina Rules of Civil Procedure which requires that "[i]n all averments of fraud, duress or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." *See Terry v. Terry*, 302 N.C. 77, 85, 273 S.E.2d 674, 678 (1981) ("[I]n pleading actual fraud the particularity requirement is met by alleging time, place and content of the fraudulent representation, identity of the person making the representation and what was obtained as a result of the fraudulent acts or representations.").

Moreover, Plaintiffs are incapable of suffering damages based on the 2011 Agreement or the 2014 Deed between Vidant, PDHC, and Pantego Creek because they were not parties to those agreements and were not third-party beneficiaries thereof.

> North Carolina recognizes the right of a third-party beneficiary . . . to sue for breach of a contract executed for his benefit. In order to assert rights as a third-party beneficiary under [a contract], plaintiffs must show they were an intended beneficiary of the contract. We have stated that plaintiffs must show:
>
> > (1) that a contract exists between two persons or entities; (2) that the contract is valid and enforceable; and (3) that the contract was executed for the direct, and not incidental, benefit of the [third party]. A person is a direct beneficiary of the contract if the contracting parties intended to confer a legally enforceable benefit on that person. *It is not enough that the contract, in fact, benefits the [third party], if, when the contract was made, the contracting parties did not intend it to benefit the [third party] directly*. In determining the intent of the contracting parties, the court should consider the circumstances surrounding the transaction as well as the actual language of the contract. When a third person seeks enforcement of a contract made between other parties, the contract must be construed strictly against the party seeking enforcement.

Babb v. Bynum & Murphrey, PLLC, 182 N.C. App. 750, 753-54, 643 S.E.2d 55, 57-58 (2007) (emphasis added) (internal citations and quotation

marks omitted) (quoting *Country Boys Auction & Realty Co., Inc. v. Carolina Warehouse, Inc.*, 180 N.C. App. 141, 146, 636 S.E.2d 309, 313 (2006)).

Here, the 2011 Agreement and the 2014 Deed between Vidant, PDHC, and Pantego Creek were for their exclusive benefit and Plaintiffs were not parties or third-party beneficiaries thereto. Therefore, any benefit they derived from the agreements would have properly been deemed incidental. Indeed, to wit, the 2011 Agreement expressly provides that "[t]he Parties agree that this Agreement and all of the Transaction Agreements are not intended to be third party beneficiary agreements."

Without standing to challenge Vidant's, PDHC's, and Pantego Creek's 2011 Agreement and 2014 Deed, Plaintiffs cannot maintain an action for fraud against Vidant. Further, because they have failed to allege with any particularity how Vidant's exercise of its express option to close the Hospital contained in the Mediation Agreement and referenced in the letter from Vidant's president and CEO to the Mayor of Belhaven constituted fraud, we hold that the trial court did not err in dismissing Plaintiffs' fraud claim against Vidant.

C. Unfair and Deceptive Trade Practices

[3] Plaintiffs next argue that the trial court erred by dismissing Belhaven's and the Community Board's unfair and deceptive trade practices claim against Vidant. We disagree.

> Under N.C.G.S. § 75-1.1, a trade practice is unfair if it is immoral, unethical, oppressive, unscrupulous, or substantially injurious to customers. A trade practice is deceptive if it has the capacity or tendency to deceive. It is well recognized, however, that actions for unfair or deceptive trade practices are distinct from actions for breach of contract, and that a mere breach of contract, even if intentional, is not sufficiently unfair or deceptive to sustain an action under N.C.G.S. § 75-1.1.

Branch Banking & Trust Co. v. Thompson, 107 N.C. App. 53, 61-62, 418 S.E.2d 694, 700 (1992) (internal citations and quotation marks omitted). "The elements of a claim for unfair or deceptive trade practices are: '(1) an unfair or deceptive act or practice, or an unfair method of competition, (2) in or affecting commerce, (3) which proximately caused actual injury to the plaintiff or to his business.' " *Noble v. Hooters of Greenville (NC), LLC*, 199 N.C. App. 163, 166, 681 S.E.2d 448, 452 (2009) (quoting *Furr v. Fonville Morisey Realty, Inc.*, 130 N.C. App. 541, 551, 503 S.E.2d 401, 408 (1998)).

Here, for the reasons discussed above, Belhaven and the Community Board have failed to allege any fraud or deception on the part of Vidant. Their claim for unfair and deceptive trade practices fails for this reason alone as they cannot establish the first element of the offense. Moreover, Plaintiffs do not have standing to bring an unfair and deceptive trade practices claim as there was no business relationship between Vidant and Plaintiffs, nor are they customers of Vidant, nor have they pled any injury in fact beyond the mere abstract allegation that "Plaintiffs suffered actual injury as a result of Vidant's conduct alleged herein." *See Carcano v. JBSS, LLC*, 200 N.C. App. 162, 175, 684 S.E.2d 41, 52 (2009) ("To have standing to bring a claim under the [Unfair and Deceptive Trade Practices] Act, the plaintiff must prove the elements of standing, including injury in fact. An injury in fact must be distinct and palpable, and must not be abstract or conjectural or hypothetical." (internal citation and quotation marks omitted)). Consequently, the trial court did not err in dismissing Belhaven's and the Community Board's unfair and deceptive trade practices claim against Vidant.

D. Breach of Fiduciary Duty

[4] Belhaven next contends that Pantego Creek owed it a fiduciary duty pursuant to the 2011 Agreement. However, as noted above, by that agreement's plain terms it was not intended for the benefit of third-party beneficiaries and was exclusively between Pantego Creek, PDHC, and Vidant. Thus, no fiduciary relationship ever existed between Pantego Creek and Plaintiffs. *See Dalton v. Camp*, 353 N.C. 647, 651, 548 S.E.2d 704, 707 (2001) ("For a breach of fiduciary duty to exist, there must first be a fiduciary relationship between the parties.").

Therefore, Belhaven has failed to sufficiently plead a viable claim for breach of fiduciary duty against Pantego Creek. Plaintiffs' arguments on this issue are without merit.

E. Section 99D-1 Claim

[5] Plaintiffs next argue that the trial court erred in dismissing the NAACP's N.C. Gen. Stat. § 99D-1 claim against Defendants. We disagree.

It is well established that

> [a]n organization generally lacks standing to sue for money damages on behalf of its members if the damage claims are not common to the entire membership, nor shared equally, so that the fact and extent of injury would require individualized proof. Where an association seeks to recover damages on behalf of its members, the extent

> of injury to individual members and the burden of supervising the distribution of any recovery mitigates against finding standing in the association.

Creek Pointe Homeowner's Ass'n v. Happ, 146 N.C. App. 159, 167, 552 S.E.2d 220, 226 (2001) (internal citation, quotation marks, and brackets omitted); *see generally Landfall Grp. Against Paid Transferability v. Landfall Club, Inc.*, 117 N.C. App. 270, 450 S.E.2d 513 (1994).

N.C. Gen. Stat. § 99D-1(a)-(b1) provides, in pertinent part, the following:

> (a) It is a violation of this Chapter if:
>
> (1) Two or more persons, motivated by race, religion, ethnicity, or gender, but whether or not acting under color of law, conspire to interfere with the exercise or enjoyment by any other *person or persons* of a right secured by the Constitutions of the United States or North Carolina, or of a right secured by a law of the United States or North Carolina that enforces, interprets, or impacts on a constitutional right; and
>
> (2) One or more persons engaged in such a conspiracy use force, repeated harassment, violence, physical harm to *persons* or property, or direct or indirect threats of physical harm to *persons* or property to commit an act in furtherance of the object of the conspiracy; and
>
> (3) The commission of an act described in subdivision (2) interferes, or is an attempt to interfere, with the exercise or enjoyment of a right, described in subdivision (1), of another person.
>
> (b) Any *person* whose exercise or enjoyment of a right described in subdivision (a)(1) has been interfered with, or against whom an attempt has been made to interfere with the exercise or enjoyment of such a right, by a violation of this Chapter may bring a civil action. . . .

> (b1) The North Carolina Human Relations Commission may bring a civil action on behalf, and with the consent, of any person subjected to a violation of this Chapter. In any such action, the court may restrain and enjoin such future acts, and may award compensatory damages and punitive damages to the person on whose behalf the action was brought. Court costs may be awarded to the Commission or the defendant, whichever prevails. Notwithstanding the provisions of G.S. 114-2, the Commission shall be represented by the Commission's staff attorney.

(Emphasis added.)

Based upon the plain and unambiguous language of the statute, it is readily apparent that the General Assembly only intended individually aggrieved persons or the North Carolina Human Relations Commission to have standing to bring an action under Section 99D-1. "Where the language of a statute is clear and unambiguous, this Court is bound by the plain language of the statute." *Riviere v. Riviere*, 134 N.C. App. 302, 304, 517 S.E.2d 673, 675 (1999); *see also Mangum v. Raleigh Bd. of Adjustment*, 196 N.C. App. 249, 255, 674 S.E.2d 742, 747 (2009) ("One of the long-standing rules of interpretation and construction in this state is *expressio unius est exclusio alterius*, the expression of one thing is the exclusion of another."). Here, no named individual person or persons are parties to this lawsuit. Thus, the NAACP is without standing to assert a Section 99D-1 claim.

II. Designation of Case as Exceptional

[6] Plaintiffs' final argument on appeal, in essence, is that the Senior Resident Superior Court Judge for the Second Judicial District and the Chief Justice of the Supreme Court of North Carolina deprived Plaintiffs of their right to a fair and impartial hearing when the Chief Justice designated the present case as an exceptional case under Rule 2.1 of the General Rules of Practice for the Superior and District Courts upon the formal recommendation of the Senior Resident Superior Court Judge for the Second Judicial District and appointed Judge Albright to adjudicate the matter. For the first time on appeal, Plaintiffs now argue that they were prejudiced by Judge Albright's adjudication of the case and request that this Court vacate Judge Albright's order dismissing Plaintiffs' claims and remand for a new hearing with a judge that they would prefer over Judge Albright. On 25 July 2016, Defendants filed a motion to dismiss this portion of Plaintiffs' appeal.

We are without jurisdiction to consider this matter on appeal as the superior court had no jurisdiction to overrule a command of the Supreme Court and our jurisdiction is derivative of the superior court's jurisdiction. *See State v. Earley*, 24 N.C. App. 387, 389, 210 S.E.2d 541, 543 (1975) ("[T]he jurisdiction of the appellate courts on an appeal is derivative. If the trial court has no jurisdiction, the appellate courts cannot acquire jurisdiction by appeal."). Consequently, we conclude that Plaintiffs' argument on this issue is wholly meritless and grant Defendants' motion to dismiss this portion of Plaintiffs' appeal.

Conclusion

For the reasons stated above, the trial court's order is affirmed and Defendants' motion to dismiss the portion of Plaintiffs' appeal concerning the issues surrounding the designation of the case as exceptional is granted.

AFFIRMED IN PART; DISMISSED IN PART.

Chief Judge McGEE and Judge INMAN concur.

KRISTIE LEA WILLIAMS, PLAINTIFF
v.
JAMES MARION CHANEY, DEFENDANT

No. COA16-274

Filed 15 November 2016

1. Child Custody and Support—order not to make derogatory statements—ambiguous—willfulness

Where the trial court issued an order modifying plaintiff-mother's visitation and directing plaintiff not to make derogatory statements about the child or the child's family members, it was ambiguous whether the order proscribed the comments that plaintiff subsequently posted on Facebook. Thus, it could not be said that plaintiff's actions were willful, and it was error for the trial court to find her in contempt of the order.

2. Child Custody and Support—attorney fees—insufficient findings

In an action initiated by plaintiff-mother in 2001 to obtain child custody and support, the trial court erred by ordering plaintiff to

pay attorney fees where the trial court's order contained no findings of fact indicating that the action was frivolous or, alternatively, that defendant was acting in good faith and defendant did not have sufficient means to defray the costs and expenses of the matter.

Appeal by Plaintiff from order entered 3 December 2015 by Judge Larry J. Wilson in Lincoln County District Court. Heard in the Court of Appeals 6 September 2016.

Kristie Lea Williams, pro se.

James M. Chaney, Jr., pro se.

DILLON, Judge.

Plaintiff Kristie Lea Williams appeals the trial court's contempt order entered 3 December 2015. For the following reasons, we reverse.

I. Background

Plaintiff and Defendant James Marion Chaney, Jr., have been engaged in a protracted child custody battle for over a decade.[1] At present, Defendant has primary legal and physical custody of the child, and Plaintiff has certain visitation rights.

In May 2015, the trial court entered an order which modified Plaintiff's visitation and directed Plaintiff not to make derogatory statements about the child or the child's family members. On 3 December 2015, the trial court entered an order finding Plaintiff in contempt of the May 2015 order due to Plaintiff's Facebook group page post, and directed Plaintiff to pay attorney's fees. Forty-two days later, on 14 January 2016, Plaintiff filed her notice of appeal from the contempt order.

II. Appellate Jurisdiction

Defendant has filed motions to dismiss Plaintiff's appeal, contending, in pertinent part, that Plaintiff's notice of appeal and her petition to appeal as an indigent were untimely. Plaintiff avers that she was not

1. This appeal marks the fourth in this matter. *See Williams v. Chaney*, No. COA 10-1278, 2011 WL 2445950 (N.C. Ct. App. June 21, 2011); *Williams v. Chaney*, No. COA11-164, 2011 WL 2848846 (N.C. Ct. App. July 19, 2011); *Williams v. Chaney*, ___ N.C. App. ___, 782 S.E.2d 122 (2016) (unpublished).

served with the contempt order until two weeks after it was entered, and that she filed her notice of appeal and indigent affidavit within thirty days of service.

Failure to timely file a notice of appeal as required by our Rules of Appellate Procedure "mandates dismissal of an appeal." *Dogwood Dev. & Mgmt. Co. v. White Oak Transp. Co.*, 362 N.C. 191, 197, 657 S.E.2d 361, 365 (2008) (internal quotation marks omitted). Similarly, failure to timely file a petition to appeal as an indigent is fatal. *See Anderson v. Worthington*, 238 N.C. 577, 578, 78 S.E.2d 333, 333 (1953) (holding that compliance with N.C. Gen. Stat. § 1-288 is "mandatory and jurisdictional in character").

While it is unclear from the record whether this Court has jurisdiction to review Plaintiff's appeal, we exercise our "authority pursuant to North Carolina Rule of Appellate Procedure 21(a)(1) to treat the purported appeal as a petition for writ of certiorari," *Luther v. Seawell*, 191 N.C. App. 139, 142, 662 S.E.2d 1, 3 (2008) (internal quotation marks omitted), and grant certiorari due to Plaintiff's seeming failure to take timely action. *See* N.C. R. App. P. 21(a)(1).

III. Standard of Review

When reviewing a contempt order, our inquiry is "limited to determining whether there is competent evidence to support the findings of fact and whether the findings support the conclusions of law." *Shippen v. Shippen*, 204 N.C. App. 188, 189, 693 S.E.2d 240, 243 (2010) (internal quotation marks omitted). "In contempt proceedings the judge's findings of fact are conclusive on appeal when supported by any competent evidence and are reviewable only for the purpose of passing on their sufficiency to warrant the judgment." *Clark v. Clark*, 294 N.C. 554, 571, 243 S.E.2d 129, 139 (1978).

IV. Analysis

Plaintiff argues that the finding of contempt in the contempt order should be reversed. She also argues that the award of attorney's fees in the contempt order should be reversed. We address each argument in turn.

A. Finding of Contempt Was Improper

[1] In the contempt order, the trial court held Plaintiff in contempt of the May 2015 order. In pertinent part, the May 2015 order states as follows:

> The Plaintiff/Mother shall not intimidate the child or make any derogatory statements about the child or any of the child's family members.

The trial court held Plaintiff in contempt of this May 2015 order for posting certain comments on the Facebook page for her child's football team. These comments appear to express her frustration about missing a football game due to Defendant, the team's coach, allegedly failing to provide the correct information about the team's schedule. Specifically, she posted the following:

> I was confused as well because the calendar on the website for the school athletic department and the schedule that was handed out all said they had a JV game at Bessemer City and there was nothing anywhere on the school website that said it changed. Also, there was no mention in any of these places of the game they played during their Bye/Open week. Needless to say we missed getting to attend the Bye/Week game at Stuart Cramer due to not knowing. Then after me having cancer surgery on my upper leg and stiches we fought rush hour traffic to get over to Bessemer City for the JV game last Thursday night only to find out upon arrival there was no JV game, they haven't had a JV team for 2 years. **My son's father James Chaney is a coach on the team and he did not inform me of either of the above changes. Very upset how I am attempting to rely on correct information being posted and the coaching staff communicating responsibly to all parents, divorced or not. I was in so much pain and traveled from SC to see that game and wasted all that gas and it could have been avoided with communication. I hope going further the information posted is accurate and the coaching staff is held to a[n] ethical standard of communicating with all parents or they should not be on the staff to use it as a way to keep a parent from participating/watching their child at a sporting event.**

(alterations in original).

The May 2015 order does not expressly prohibit Plaintiff from publishing such comments on Facebook. In the contempt order, the trial court interpreted the May 2015 order to prohibit such comments. However, the trial court admits in the contempt order that the prior May

2015 order was not "artfully drawn" and that it was putting Plaintiff "on notice that the prohibition of the May 15, 2015 Order clearly covers communications in such a forum as the Facebook[.]"

We hold that the trial court did not err in its interpretation of its prior May 2015 order. It is certainly appropriate for a trial court to clarify its prior orders, and we are mindful that we must give at least some deference to the trial court's interpretation of its orders. *Blevins v. Welch*, 137 N.C. App. 98, 102, 527 S.E.2d 667, 671 (2000).

However, to be held *in contempt* for violating the May 2015 order, it must be shown that Plaintiff's violation of the May 2015 order was willful. N.C. Gen. Stat. § 5A-21(a)(2a) (2013) (stating that a court may enter a finding of contempt only if "[t]he noncompliance by the person to whom the order is directed is willful"). For contempt purposes, a party's noncompliance is willful if there is both "*knowledge* and *a stubborn resistance*" of a trial court directive. *Mauney v. Mauney*, 268 N.C. 254, 268, 150 S.E.2d 391, 393 (1966) (emphasis added). *See also Campen v. Featherstone*, 150 N.C. App. 692, 695, 564 S.E.2d 616, 618 (2002) (restating same general principle). However, "[i]f the prior order is *ambiguous* such that a defendant could not understand his respective rights and obligations under that order, he cannot be said to have *knowledge* of that order for purposes of contempt proceedings." *Blevins*, 137 N.C. App. at 103, 527 S.E.2d at 671 (emphasis added) (internal quotation marks omitted).

We hold that it is ambiguous whether the language of the May 2015 order proscribed Plaintiff's conduct. Accordingly, it cannot be said that her actions were willful; and, therefore, it was error for the trial court to find her in contempt of the May 2015 order. Of course, now that the contempt order has put Plaintiff on notice by clarifying the May 2015 order, Plaintiff may be held in contempt if she makes a similar posting in the future.

B. The Trial Court's Award of Attorney's Fees Was Erroneous

[2] Absent statutory authority, "[t]he general rule . . . is that counsel fees are not allowed as a part of the costs in civil actions or special proceedings." *Bowman v. Comfort Chair Co.*, 271 N.C. 702, 704, 157 S.E.2d 378, 379 (1967). N.C. Gen Stat. § 50-13.6 permits the recovery of attorney's fees in custody proceedings if the following applies:

> [T]he court may in its discretion order payment of reasonable attorney's fees to an interested party acting in good faith who has insufficient means to defray the expense

> of the suit. Before ordering payment of a fee in a support action, the court *must find as a fact* that the party ordered to furnish support has refused to provide support which is adequate under the circumstances existing at the time of the institution of the action or proceeding; provided however, *should* the court *find as a fact* that the supporting party has initiated a frivolous action or proceeding the court may order payment of reasonable attorney's fees to an interested party as deemed appropriate under the circumstances.

N.C. Gen. Stat. § 50-13.6 (2013) (emphasis added).

This action was initiated by Plaintiff in 2001 to obtain custody and child support. The May 2015 order, however, contained no findings of fact indicating that the action was frivolous or, alternatively, that (1) Defendant was acting in good faith; and (2) Defendant did "not have sufficient means to defray the costs and expenses of this matter." *Wiggins v. Bright*, 198 N.C. App. 692, 696, 679 S.E.2d 874, 877 (2009). Indeed, the May 2015 order contained no information as to the authority on which the trial court was relying in awarding attorney's fees. Under these circumstances, the trial court's award of attorney's fees was erroneous.

V. Conclusion

For the foregoing reasons, we reverse the finding of contempt and award of attorney's fees in the contempt order. We remand this matter back to the trial court for further proceedings not inconsistent with this opinion. As we find that Plaintiff's noncompliance with the May 2015 order was not willful, we need not address Plaintiff's remaining arguments.

REVERSED.

Judges BRYANT and STEPHENS concur.

JAEKWON WILLIAMS, A MINOR, BY AND THROUGH HIS GUARDIAN AD LITEM, DAVID JONES, DARRIUS WILLIAMS AND JASMINE WILLIAMS, PLAINTIFFS

v.

WOODMEN FOUNDATION D/B/A LIONS WATER ADVENTURE PARK, AKA WOODMEN FOUNDATION, A NEBRASKA NOT-FOR PROFIT CORPORATION;

CITY OF ROCKY MOUNT D/B/A CITY OF ROCKY MOUNT PARKS & RECREATION DEPARTMENT D/B/A QUEST SUMMER DAY CAMP;

COUNTY OF LENOIR D/B/A CITY OF KINSTON/LENOIR COUNTY PARKS & RECREATION DEPARTMENT AND CITY OF KINSTON D/B/A CITY OF KINSTON/LENOIR COUNTY PARKS & RECREATION DEPARTMENT;

JORDAN O'NEAL, JORDAN SHEAR, HARRISON WIGGINS, UNNAMED LIONS WATER ADVENTURE PARK LIFEGUARDS AND UNNAMED PERSONS WITH MANAGERIAL, OPERATIONAL AND SUPERVISORY RESPONSIBILITY FOR LIONS WATER ADVENTURE PARK;

JARRON PARKER, MICHAEL DELOATCH, TINA MOORE, JUSTIN ATKINSON, TIARA BATTLE AND UNNAMED QUEST SUMMER DAY CAMP EMPLOYEES;

UNNAMED ROCKY MOUNT PARKS & RECREATION DEPARTMENT EMPLOYEES; UNNAMED KINSTON/LENOIR COUNTY PARKS & RECREATION DEPARTMENT EMPLOYEES, DEFENDANTS

No. COA16-167

Filed 15 November 2016

Venue—non-fatal drowning—cause of action based on events in Lenoir County—venue improper in Edgecombe County

In a case involving the non-fatal drowning of a child at a day camp operated by the City of Rocky Mount, where the only cause of action after the voluntary dismissal of numerous defendants was against defendant-appellants based on what allegedly occurred in Lenoir County, venue was improper in Edgecombe County and should have been transferred to Lenoir County.

Appeal by defendants from order entered 28 September 2015 by Judge Milton F. Fitch, Jr., in Edgecombe County Superior Court. Heard in the Court of Appeals 23 August 2016.

Taft, Taft & Haigler, PA, by Thomas F. Taft, Sr. and Lindsey A. Bullard, and Richardson, Patrick, Westbrook & Brickman, LLC, by Terry E. Richardson, Jr. and Brady R. Thomas, pro hac vice, for plaintiff-appellees.

Cranfill Sumner & Hartzog LLP, by Dan M. Hartzog, Jaye E. Bingham-Hinch, Meredith Taylor Berard, and Stephanie Gaston

Poley, for defendant-appellants City of Kinston, Caroline Banks, Stephen Corbett Hall, Jordan Shear, and Harrison Wiggins.

Cauley Pridgen PA, by James P. Cauley, III and David M. Rief, for defendant-appellants City of Kinston, Caroline Banks, Stephen Corbett Hall, Jordan O'Neal, Jordan Shear, and Harrison Wiggins.

Teague Campbell Dennis & Gorham LLP, by Bryan T. Simpson and Natalia K. Isenberg, for defendant-appellant County of Lenoir.

Allen Moore & Rogers LLP, by Jody Moore, and Williams Mullen, by Elizabeth D. Scott, for defendant-appellee Woodmen Foundation d/b/a Lions Water Adventure Park, aka Woodmen Foundation. No brief filed.[1]

BRYANT, Judge.

Where the only cause of action is against defendant-appellants who were not voluntarily dismissed from the case and that cause of action is based solely on allegations of what occurred in Lenoir County, venue is improper in Edgecombe County, and we reverse the order of the trial court.

Jaekwon Williams, a minor, by and through his Guardian Ad Litem David Jones, Darrius Williams, and Jasmine Williams ("plaintiffs"), filed a complaint on 17 March 2015 in Edgecombe County Superior Court asserting a negligence claim against Woodmen Foundation, d/b/a Lions Water Adventure Park; City of Rocky Mount, d/b/a City of Rocky Mount Parks & Recreation Department, d/b/a Quest Summer Day Camp; County of Lenoir and City of Kinston, d/b/a City of Kinston/Lenoir County Parks & Recreation Department; five lifeguards from Lions Water Adventure Park; and five day camp employees from Quest Summer Day Camp (collectively, "defendants"). Plaintiffs also asserted a negligence per se claim against defendants Woodmen, County of Lenoir, and City of Kinston, after alleging that Jaekwon suffered a "non-fatal drowning" on 11 August 2014. Plaintiffs filed an Amended Complaint (also in Edgecombe County) on 20 March 2015, asserting the same claims.

Plaintiffs' relevant factual allegations in the amended complaint are as follows:

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1. We note this unusual circumstance in which defendant-appellee Woodmen Foundation is not a party to this appeal; however, since this Court granted a motion to substitute counsel on behalf of defendant-appellee Woodmen Foundation during the pendency of this appeal, we list the above as counsel for explanatory purposes.

> 25. That on August 11, 2014, Jaekwon Williams was attending Quest Summer Day Camp, which was operated by Defendant Rocky Mount, d/b/a Rocky Mount Parks & Rec.
>
> 26. That on August 11, 2014, Jaekwon Williams traveled with the Quest Summer Day Camp to Lions Water Adventure Park, a water park owned by Defendant Woodmen and operated jointly by Defendants Woodmen, County of Lenoir and City of Kinston, both d/b/a Kinston/Lenoir Parks and Rec.
>
> 27. That while at Lions Water Adventure Park, Jaekwon Williams, who, pursuant to N.C.G.S. § 8-46, has a future life expectancy of at least 67.6 years, entered the water of the lap pool owned by Defendant Woodmen and operated jointly by Defendants Woodmen, County of Lenoir and City of Kinston, both d/b/a Kinston/Lenoir Parks and Rec.
>
> 28. That Defendants were informed and/or should have known that Jaekwon Williams was not able to swim, and should have used ordinary care in assuring his safety.
>
> 29. That due to the negligence, carelessness, recklessness and/or wanton conduct with reckless indifference of all Defendants, Jaekwon Williams was found at the bottom of the lap pool of Lions Water Adventure Park with no pulse or respirations, and suffered severe and permanent physical and mental injuries as a result of said non-fatal drowning.

In May and June of 2015, defendants filed their respective answers, amended answers, and motions to dismiss. Defendant County of Lenoir and defendants City of Kinston, Caroline Banks, Stephen Corbett Hall, Jordan O'Neal, Jordan Shear, and Harrison Wiggins (collectively "Kinston defendants") also filed motions to change venue from Edgecombe County to Lenoir County. Plaintiffs filed replies to each of defendants' amended answers on 14 July and 22 July 2015.

Prior to the hearing on the motion to change venue, plaintiffs settled their claim against defendants City of Rocky Mount d/b/a City of Rocky Mount Parks & Recreation Department d/b/a Quest Summer Day Camp, Jarron Parker, Tina Moore, Tiara Battle, Justin Atkinson, Michael DeLoatch, Unnamed Quest Summer Day Camp Employees, and Unnamed Rocky Mount Parks & Recreation Department employees (collectively, "Rocky Mount defendants"). However, it was not until 28 January 2016 that plaintiffs filed a voluntary dismissal as to the Rocky Mount defendants.

Meanwhile, on 8 September 2015, the Honorable Milton F. Fitch Jr., Judge presiding, heard the Motions to Change Venue of the Kinston defendants and the County of Lenoir (collectively "defendant-appellants") in Edgecombe County Superior Court. Plaintiffs submitted the affidavits of Jasmine Williams and Charles Wilson, MD, in opposition to the motions to change venue, which both generally stated that it would be in Jaekwon's best medical interests to be transported the shorter distance to the Edgecombe County Courthouse, rather than to the one in Lenoir County, for purposes of this litigation. Plaintiffs' counsel also argued it would be improper for the trial court to make a venue decision at that time, because the issue "[would] not [be] ripe to be heard . . . until discovery [had] been complete[d] and until factual determinations ha[d] been made." Counsel for defendant-appellants argued that because the Rocky Mount defendants had been voluntarily dismissed from the action, "there is no way that a cause of action or any part of a cause of action against [defendant-appellants] took place in Edgecombe County[,]" as "[a]ny cause of action against [defendant-appellants] had to have taken place at that pool in Lenoir County."

On 28 September 2015, Judge Fitch entered an order denying appellants' motions to change venue, finding "that the cause or some part thereof arose in Edgecombe County." Defendant-appellants appeal.

On 15 April 2016, defendant-appellants filed a motion to supplement the record on appeal with this Court. Defendant-appellants intended that a filed copy of the voluntary dismissal order dismissing the Rocky Mount defendants from this matter be a file-stamped copy, but did not receive one prior to the record being filed with this Court on 19 February 2016. Defendant-appellants did include a copy of the voluntary dismissal order in the Rule 11(c) Supplement to the Printed Record on Appeal, but it was not a file-stamped version. Defendant-appellants requested that a file-stamped copy of the voluntary dismissal be included as a supplement to the record on appeal pursuant to Rule 9(b)(5) of the North Carolina Rules of Appellate Procedure. For the following reasons, we allow defendant-appellants' motion.

In opposition to defendant-appellants' motion, plaintiffs claimed the filed-stamped copy of the voluntary dismissal—dated 28 January 2016—should not be included in the record on appeal as it was not "submitted for consideration" to the trial court prior to the filing of the trial court's order on 28 September 2015, which denied defendant-appellants' motion to change venue, and which is the order from which defendant-appellants now appeal.

However, even if a file-stamped version of the voluntary dismissal could not have been submitted to the trial court, practically speaking, plaintiffs cannot show that they would be prejudiced were this Court to allow defendant-appellants' motion to include a file-stamped copy in the record. To the contrary, the transcript of the hearing makes plain that the trial court and all parties present at the hearing were aware or became aware that plaintiffs had settled their claims with the Rocky Mount defendants, and certainly, plaintiffs themselves were aware of the settlement. Indeed, counsel for plaintiffs, in response to the question from the court, "Is that true, did Rocky Mount settle the claims?", stated, "Yes, sir, they have, Your Honor. It hadn't been finally approved." Accordingly, where plaintiffs cannot show that any improper prejudice would result, we allow defendant-appellants' motion to supplement the record on appeal.

Defendant-appellants' sole argument on appeal is that the trial court erred in denying defendants' motion to change venue, as Edgecombe County is not a proper venue for this action pursuant to N.C. Gen. Stat. §§ 1-77(2) and 1-83. Specifically, defendant-appellants argue venue is improper in Edgecombe County because defendant-appellants are "public officers," and each of defendant-appellants' actions or inactions alleged by plaintiffs occurred in Lenoir County. We agree.

Defendant-appellants appeal from an interlocutory order denying their motion to change venue from Edgecombe County to Lenoir County. "[I]mmediate appeal is available from an interlocutory order . . . which affects a 'substantial right.' " *Sharpe v. Worland*, 351 N.C. 159, 162, 522 S.E.2d 577, 579 (1999) (citations omitted). This Court has previously held that "a denial of a motion to transfer venue affects a substantial right." *Hyde v. Anderson*, 158 N.C. App. 307, 309, 580 S.E.2d 424, 425 (2000) (citation omitted). Accordingly, "[t]he trial court's order is immediately appealable and properly before [this Court]." *Morris v. Rockingham Cnty.*, 170 N.C. App. 417, 418, 612 S.E.2d 660, 662 (2005).

"A determination of venue under N.C. Gen. Stat. § 1-83(1) is . . . a question of law that [this Court] review[s] *de novo*." *TD Bank, N.A. v. Crown Leasing Partners, LLC*, 224 N.C. App. 649, 654, 737 S.E.2d 738, 741–42 (2012) (quoting *Stern v. Cinoman*, 221 N.C. App. 231, 232, 728 S.E.2d 373, 374 (2012)).

North Carolina General Statutes, section 1-83 provides, in relevant part, as follows:

> If the county designated for that purpose in the summons and complaint is not the proper one, the action may, however, be tried therein, unless the defendant, before the time of answering expires, demands in writing that the trial be conducted in the proper county, and the place of trial is thereupon changed by consent of parties, or by order of the court.
>
> The court may change the place of trial in the following cases:
>
> (1) When the county designated for that purpose is not the proper one.

N.C. Gen. Stat. § 1-83 (2015).

> The general rule in North Carolina, as elsewhere, is that where a demand for removal for improper venue is timely and proper, the trial court has no discretion as to removal. The provision in N.C.G.S. § 1-83 that the court "may change" the place of trial when the county designated is not the proper one has been interpreted to mean "must change."

Miller v. Miller, 38 N.C. App. 95, 97, 247 S.E.2d 278, 279 (1978) (internal citations omitted). Accordingly, "the trial court has no discretion in ordering a change of venue if it appears that the action has been brought in the wrong county." *Caldwell v. Smith*, 203 N.C. App. 725, 729, 692 S.E.2d 483, 486 (2010) (citation omitted).

The venue statute applicable to a "public officer," N.C. Gen. Stat. § 1-77, provides, in relevant part, as follows:

> Actions for the following causes must be tried in the county where the cause, or some part thereof, arose, subject to the power of the court to change the place of trial, in the cases provided by law:
>
> . . .
>
> (2) Against a public officer or person especially appointed to execute his duties, for an act done by him by virtue of his office; or against a person who by his command or in his aid does anything touching the duties of such officer.

N.C.G.S. § 1-77 (2015). "The purpose of section 1-77 is to avoid requiring public officers to 'forsake their civic duties and attend the courts of a distant forum.' " *Wells v. Cumberland Cnty. Hosp. Sys., Inc.*, 150 N.C. App. 584, 587, 564 S.E.2d 74, 76 (2002) (quoting *Coats v. Sampson Cnty. Mem'l Hosp., Inc.*, 264 N.C. 332, 333, 141 S.E.2d 490, 491 (1965)).

When considering an action against a "public officer," "the following two questions must be addressed: '(1) Is defendant a "public officer or person especially appointed to execute his duties"? [and] (2) In what county did the cause of action in suit arise?' " *Morris*, 170 N.C. App. at 418, 612 S.E.2d at 662 (alteration in original) (quoting *Coats*, 264 N.C. at 333, 141 S.E.2d at 491). Regarding the first question, "[a]n action against a municipality is an action against a public officer under N.C. Gen. Stat. § 1-77(2) for purposes of venue." *Hyde*, 158 N.C. App. at 309, 580 S.E.2d at 425 (citations omitted). "Proper venue for municipalities is, therefore, usually the county in which the cause of action arose." *Id.* (citation omitted).

Regarding the second question, "a cause of action may be said to accrue, within the meaning of a statute fixing venue of actions, when it comes into existence as an enforceable claim, that is, when the right to sue becomes vested." *Morris*, 170 N.C. App. at 420, 612 S.E.2d at 663 (quoting *Smith v. State*, 289 N.C. 303, 333, 222 S.E.2d 412, 432 (1976)). In a negligence action, the right to sue is vested when a person fails "to exercise that degree of care which a reasonable and prudent [person] would exercise under similar conditions and which proximately cause injury or damage to another." *Id.* (alteration in original) (quoting *Williams v. Trust Co.*, 292 N.C. 416, 422, 233 S.E.2d 589, 593 (1977)).

"North Carolina venue is determined at the commencement of the action, as denoted by the filing of the complaint." *Caldwell*, 203 N.C. App. at 729, 692 S.E.2d at 486 (citation omitted). "When reviewing a decision on a motion to transfer venue, the reviewing court must look to the allegations of the plaintiff's complaint." *Town of Maiden v. Lincoln Cnty.*, 198 N.C. App. 687, 690, 680 S.E.2d 754, 756 (2009) (quoting *Ford v. Paddock*, 196 N.C. App. 133, 135–36, 674 S.E.2d 689, 691 (2009)). In reviewing that complaint, this Court is "not required . . . to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *Strickland v. Hedrick*, 194 N.C. App. 1, 20, 669 S.E.2d 61, 73 (2008) (alteration in original) (citation omitted).

The plain language of N.C. Gen. Stat. § 1-77 states that actions "[a]gainst a public officer or person especially appointed to execute his duties" "must be tried in the county where the cause, or some part

thereof, arose . . . .” N.C.G.S. § 1-77(2). If a claim is not being made against a non-party or entity, no “cause, or [any] part thereof” can be said to have arisen against them. *See id.* Indeed, where a party has been dismissed, for purposes of venue, the matter “proceed[s] as if he had never been a party . . . .” *Mitchell v. Jones*, 272 N.C. 499, 502, 158 S.E.2d 706, 709 (1968). Accordingly, any alleged acts or omissions by a non-party (here, the Rocky Mount defendants) which occurred in Edgecombe County, would not and could not give rise to a cause of action against the remaining defendant-appellants as no right to sue defendant-appellants has become vested by the actions or inactions of the non-party, Rocky Mount defendants. *See Morris*, 170 N.C. App. at 420, 612 S.E.2d at 663. The only remaining cause of action in this case is the cause of action against defendant-appellants, which is based solely on what allegedly occurred in Lenoir County.

Plaintiffs do not assert that any of defendant-appellants’ alleged acts or omissions took place in Edgecombe County. Rather, plaintiffs’ main argument on appeal, and entire argument to the trial court, was that it would be improper to rule on venue before plaintiffs could be permitted to conduct discovery and ascertain whether or not there were any acts or omissions which occurred in Edgecombe County, presumably by the remaining defendant-appellants. Plaintiffs’ counsel argued to the trial court, in relevant part, as follows:

> Yes, we do need to do continuing discovery with Rocky Mount in order to determine where negligence acts did occur whether they were in Edgecombe County or Nash County.
>
> For all we know they may have occurred in Pitt County or Edgecombe -- I mean, in Wayne when the bus was driving them to the swimming pool. We don’t know yet because we haven’t had that discovery.
>
> . . .
>
> We believe that discovery will show that some part of [the negligence] occurred in Edgecombe or in Nash or maybe some other county. . . .
>
> In our pleadings, Your Honor, against Rocky Mount, we allege that there would be an opportunity through discovery to determine what else, what other negligence may have occurred and where it occurred.
>
> We don’t know that right now. . . .

> We don't know any of those things yet, Your Honor. And we have a right to discover that and then bring these matters before the Court to make an informed decision on venue.
>
> . . .
>
> [W]e believe that that negligence occurred in Edgecombe or Nash County, but we don't know yet. And so we couldn't allege that in specificity . . . .
>
> It is exactly the reason that we're entitled to discovery before this matter is ri[pe] to be heard, Your Honor.
>
> . . .
>
> [U]ntil we have a chance to conduct other discovery, we won't know where that negligence occurred.
>
> . . .
>
> [T]his is not ripe to be heard at this moment until discovery has been complete and until factual determinations have been made.

Not surprisingly, plaintiffs have cited to no authority to support their contention that a motion on venue cannot be heard until discovery has been completed, as this is not the law. The law is clear: venue is properly determined at the commencement of the action by the factual allegations of the complaint. *See Caldwell*, 203 N.C. App. at 729, 692 S.E.2d at 486 (holding venue improper in Dare County where the plaintiffs' complaint and the defendant's affidavit indicated no party resided in that county at the commencement of the action). Discovery is not a tool for assessing where an action should ultimately proceed. And where, as here, certain parties have been dismissed from the action, it is as though those parties were never a part of the action. *See Mitchell*, 272 N.C. at 502, 158 S.E.2d at 709. Thus, as plaintiffs have repeatedly admitted that at the commencement of this action they had no facts which they could plead as to any acts or omissions by the remaining parties occurring outside of Lenoir County, this matter should be transferred to Lenoir County.

Accordingly, the trial court's order denying defendant-appellants' motion to change venue is

REVERSED.

Judges STEPHENS and DILLON concur.

PHOEBE WILLIFORD, PETITIONER
v.
NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, AND
NORTH CAROLINA DIVISION OF MEDICAL ASSISTANCE, RESPONDENTS

No. COA16-393

Filed 15 November 2016

Public Assistance—Workers' Compensation Medicare Set-Aside Account—not counted from determining Medicaid eligibility

The trial court erred by affirming the agency decision of the N.C. Department of Health and Human Services that treated petitioner's Workers' Compensation Medicare Set-Aside Account (WCMSA) as a countable resource for purposes of determining petitioner's eligibility for Medicaid. Petitioner established that the terms of a legally binding agreement—a Settlement Agreement incorporated into an order of the Industrial Commission—imposed legal restrictions on her use of the WCMSA funds, and therefore those funds could not be counted for purposes of determining her eligibility for Medicaid.

Appeal by petitioner from order entered 8 February 2016 by Judge Charles H. Henry in Sampson County Superior Court. Heard in the Court of Appeals 6 October 2016.

Kathleen G. Sumner for petitioner-appellant.

Attorney General Roy Cooper, by Assistant Attorney General Kimberly S. Murrell, for respondents-appellees.

ZACHARY, Judge.

Phoebe Williford (petitioner) appeals from an order by the trial court that affirmed the final agency decision of the North Carolina Department of Health and Human Services ("DHHS") and DHHS' Division of Medical Assistance ("DMA") (collectively, respondents), that terminated petitioner's entitlement to medical assistance benefits ("Medicaid"). On appeal, petitioner argues that the trial court erred by finding and concluding that the funds in petitioner's Workers Compensation Set-Aside Account were a countable resource for purposes of determining petitioner's eligibility for Medicaid. For the reasons that follow, we agree.

I. Factual and Procedural Background

Petitioner was born on 8 November 1948, and is now a 68 year old widow. On 25 November 2005, petitioner suffered a workplace injury to her left arm and right knee; plaintiff has not been employed since she was injured. Petitioner sought and obtained workers' compensation medical and disability benefits from her employer. Petitioner became eligible for Medicare on 8 November 2009, when she reached 65 years of age. Petitioner received medical treatments for her injury, which were paid for with workers' compensation medical benefits. After several years of medical treatment, petitioner and her employer disagreed about the degree of permanent impairment of petitioner's left arm and right knee, and about the likelihood that petitioner's workplace injuries would require further medical treatment. The parties engaged in mediation and reached an agreement resolving the contested issues related to petitioner's workers' compensation claim.

On 19 April 2011, the Industrial Commission entered an order pursuant to N.C. Gen. Stat. § 97-17, that incorporated the parties' settlement agreement. In its order, the Commission concluded that the settlement agreement was "fair and just" and properly addressed the interests of all parties. The terms of the settlement agreement included a provision awarding petitioner a lump sum[1] for workers' compensation disability payments and attorney's fees. The agreement also provided that petitioner's employer would contribute $46,484.12 to fund a Workers' Compensation Medicare Set-Aside Account (WCMSA), which represented the parties' settlement of all future workers' compensation medical benefits for which petitioner's employer would be liable and that would otherwise be paid by Medicare.

When petitioner reached 65 years of age, she applied for and received assistance with her medical expenses pursuant to Medicaid for the Aged. Medicaid, a state and federal program discussed in detail below, provides funds for the medical expenses of applicants who meet various requirements and whose income and financial resources are below a specified amount. The requirement that is relevant to this appeal is that an applicant who is single and is over 65 years old may have no more than $2000 in liquid assets, such as bank accounts. The dispositive issue in this case is whether respondents properly classified the funds in petitioner's WCMSA as a financial resource for purposes of determining petitioner's eligibility for Medicaid.

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1. The dollar amount of the settlement payment for disability and attorney's fees is blacked out in the copy of the agreement contained in the record.

On 27 December 2013, a local hearing officer for the Sampson County Department of Social Services (DSS) issued a decision terminating petitioner's eligibility for Medicaid, on the grounds that the funds in petitioner's WCMSA, which were then approximately $46,630, were a countable resource. Inclusion of petitioner's WCMSA in the calculation of her liquid assets resulted in respondents' conclusion that petitioner had more than $48,000 in countable resources. Petitioner appealed the decision of the local hearing officer to DHHS. On 10 June 2014, DHHS issued a "tentative decision" concluding that petitioner's WCMSA was a countable resource, and affirming the decision by DSS to terminate petitioner's Medicaid benefits. DHHS issued its final agency decision on 11 July 2014, in which it affirmed the tentative decision. On 30 July 2014, petitioner filed a petition for judicial review, and on 31 August 2015 the trial court conducted a hearing on this matter. On 8 February 2016, the trial court entered an order denying petitioner's petition for judicial relief and affirming DHHS's ruling that the funds in petitioner's WCMSA were a countable resource for purposes of determining her eligibility for Medicaid. Petitioner noted a timely appeal to this Court from the trial court's order.

II. Standard of Review

Respondent DHHS is a North Carolina State agency. The standard of review of an administrative agency's decision is set out in N.C. Gen. Stat. § 150B-51 (2015), which "governs both trial and appellate court review of administrative agency decisions." *N. C. Dept. of Correction v. Myers*, 120 N.C. App. 437, 440, 462 S.E.2d 824, 826 (1995), *aff'd per curiam*, 344 N.C. 626, 476 S.E.2d 364 (1996). N.C. Gen. Stat. § 150B-51 provides that:

> (b) The court reviewing a final decision may affirm the decision or remand the case for further proceedings. It may also reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional provisions;
>
> (2) In excess of the statutory authority or jurisdiction of the agency or administrative law judge;
>
> (3) Made upon unlawful procedure;
>
> (4) Affected by other error of law;
>
> (5) Unsupported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or

> (6) Arbitrary, capricious, or an abuse of discretion.
>
> (c) . . . With regard to asserted errors pursuant to subdivisions (1) through (4) of subsection (b) of this section, the court shall conduct its review of the final decision using the *de novo* standard of review. With regard to asserted errors pursuant to subdivisions (5) and (6) of subsection (b) of this section, the court shall conduct its review of the final decision using the whole record standard of review.

"Under the whole record test, the reviewing court must examine all competent evidence to determine if there is substantial evidence to support the administrative agency's findings and conclusions." *Henderson v. N.C. Dep't of Human Resources*, 91 N.C. App. 527, 530, 372 S.E.2d 887, 889 (1988). "Where the petitioner alleges that the agency decision was based on error of law, the reviewing court must examine the record *de novo*[.] . . . Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the [trial court]." *Blackburn v. N.C. Dep't of Public Safety*, __ N.C. App. __, __, 784 S.E.2d 509, 518 (internal quotations omitted), *disc. review denied*, __ N.C. __, 786 S.E.2d 915 (2016). In the present case, the facts are largely undisputed and we will apply a *de novo* standard of review to the legal issues raised in this appeal.

III. Eligibility for Medicaid: Legal Principles

A. Introduction

"The Medicaid program was established by Congress in 1965 to provide federal assistance to states which chose to pay for some of the medical costs for the needy. Whether a state participates in the program is entirely optional. 'However, once an election is made to participate, the state must comply with the requirements of federal law.' " *Correll v. Division of Social Services*, 332 N.C. 141, 143, 418 S.E.2d 232, 234 (1992) (quoting *Lackey v. N.C. Dept. of Human Resources*, 306 N.C. 231, 235, 293 S.E.2d 171, 175 (1982)) (other citation omitted). Accordingly, N.C. Gen. Stat. § 108A-56 (2015) states in relevant part that "[a]ll of the provisions of the federal Social Security Act providing grants to the states for medical assistance are accepted and adopted, and the provisions of this Part shall be liberally construed in relation to such act so that the intent to comply with it shall be made effectual."

B. Eligibility for Medicaid Benefits

"North Carolina's Medicaid program is supervised and administered by Respondent Division of Medical Assistance (DMA), an agency

within the Department of Health and Human Services (DHHS)." *Ass'n for Home & Hospice Care, Inc. v. Div. of Med. Assistance*, 214 N.C. App. 522, 523, 715 S.E.2d 285, 287 (2011). DMA is "authorized to adopt . . . rules to implement or define the federal laws and regulations, the North Carolina State Plan of Medical Assistance . . . [and] the terms and conditions of eligibility for applicants and recipients of the Medical Assistance Program[.]" N.C. Gen. Stat. § 108A-51.1B(a) (2015). These rules are set out in the North Carolina Administrative Code (NCAC) and include, as relevant to this appeal, the following:

> 10A NCAC 23A .0102.
>
> > (57) "Reserve" means assets owned by members of the budget unit and that have a market value.
>
> 10A NCAC 23E .0202.
>
> > (a) North Carolina has contracted with the Social Security Administration under Section 1634 of the Social Security Act to provide Medicaid to all SSI recipients. Resource eligibility for individuals under any Aged, Blind, and Disabled coverage group shall be determined based on standards and methodologies in Title XVI of the Social Security Act[.] . . .
> >
> > . . .
> >
> > (i) The limitation of resources held for reserve for the budget unit shall be as follows: . . . (2) for aged, blind, and disabled cases, two thousand dollars ($2000.00) for a budget unit of one[.]
>
> 10A NCAC 23E .0207 RESERVE
>
> > (d) For all aged, blind, and disabled cases, the resource limit, financial responsibility, and countable and non-countable assets are based on standards and methodology in Title XVI of the Social Security Act[.]

These rules establish that in North Carolina eligibility for Medicaid is determined utilizing the federal standard for determining eligibility for Supplemental Security Income (SSI). Therefore, we next review the federal statutes and standards that are relevant to determining whether the WCMSA is an asset that should be included in calculating petitioner's financial reserves.

In the Code of Federal Regulations ("C.F.R."), 20 C.F.R. § 416.1205 states that an "aged, blind, or disabled" applicant for SSI must, in addition to meeting all other eligibility requirements, have no more than $2000 in "nonexcludable resources." Thus, respondents and petitioner are in agreement that petitioner may have no more than $2000 in countable assets. 20 C.F.R. 416.1201 defines "resources" in relevant part as follows:

> § 416.1201. Resources; general.
>
> (a) Resources; defined. . . . [R]esources means cash or other liquid assets . . . that an individual . . . owns and could convert to cash to be used for his or her support and maintenance.
>
> (1) If the individual has the right, authority or power to liquidate the property . . . it is considered a resource. . . .

The Social Security Administration (SSA) also issues a Program Operations Manual System, known as POMS, that instructs SSA employees on the SSA's interpretation of eligibility standards for SSI. "The POMS represent the 'publicly available operating instructions for processing Social Security claims.' The Supreme Court has stated that '[w]hile these administrative interpretations are not products of formal rulemaking, they nevertheless warrant respect.' " *Kelley v. Comm'r of Soc. Sec.*, 566 F.3d 347, 351 n.7 (3rd Cir. 2009) (quoting *Wash. State Dep't of Soc. & Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 385, 154 L. Ed. 2d 972 (2003)).

Several POMS sections are relevant to the issues raised in this case. POMS SI 01110.100B. provides that "resources" are "cash and any other personal property" that an individual "owns; has the right, authority, or power to convert to cash [and]; is not legally restricted from using for [her] support and maintenance." Similarly, POMS SI 01120.010B.2. states in pertinent part that in order for an asset to be a countable resource, an "individual must have a legal right to access property. Despite having an ownership interest, property cannot be a resource if the owner lacks the legal ability to access funds[.]"

POMS SI 01120.010D gives several examples of assets that, although owned by an applicant, are not countable resources. One of these is set out in POMS SI 01120.010D.2., and describes a situation in which a court order requires an applicant to retain ownership of the house where his ex-wife resides with the applicant's children until the applicant's children reach the age of majority. POMS SI 01120.010D.2. states

that in that situation the applicant "is legally barred from converting [the house] to cash to be used for his own support and maintenance" and that as a result the house "is not his resource until . . . his younger son's eighteenth birthday." Another example set out in POMS SI 01120.010 is the circumstance in which an SSI recipient is awarded damages "to be used solely for medical expenses related to the accident." POMS SI 01120.010D.5. states that in that situation, "[a]lthough [the SSI recipient] owns the funds and has direct access to them, he is not legally free to use them for his own support and maintenance. Therefore the award funds are neither income nor resource." Finally, POMS SI 01110.115A. states SSA's "general rule" that "[a]ssets of any kind are not resources if the individual does not have . . . the legal right, authority, or power to liquidate them . . . or the legal right to use the assets for [her] support and maintenance."

As discussed above, in North Carolina eligibility for Medicaid is determined by reference to the standards applicable to eligibility for SSI. We conclude that these federal standards clearly establish that, in order for a given asset to be a countable resource, the asset must be *legally* available to the applicant *without legal restriction* on the applicant's authority to use the resource for support and maintenance. In reaching this conclusion, we are aware that 20 C.F.R. 416.1201(a)(1) states that if an applicant "has the right, authority or power to liquidate the property . . . it is considered a resource," while the POMS defines a countable resource as an asset that an applicant "owns; has the right, authority, or power to convert to cash [and]; is not *legally* restricted from using for [her] support and maintenance." We easily conclude that the phrase "right, authority or power to liquidate" refers to the legal right or authority to access funds:

> The [appellants] rely on . . . a federal regulation defining "resources" for purposes of an eligibility determination. The regulation provides: "If the individual has the right, authority or power to liquidate the property or his or her share of the property, it is considered a resource." . . . 20 C.F.R. § 416.1201(a)(1). Consistent with the agency's interpretation, Social Security Administration, Program Operations Manual Systems § SI 01110.115.A, and the federal government's litigating position . . . we think the regulation naturally *refers to a "legal" right, authority, or power to liquidate. What other sort of "right" or "power" would be at issue?* If the regulation merely referred to a raw power to liquidate – even in breach of the contract or

> violation of law -- then it would impose virtually no limitation, for a pair of unscrupulous actors can reduce almost anything of value to a dollar amount.

Geston v. Anderson, 729 F.3d 1077, 1083 (8th Cir. N.D. 2013) (emphasis added).

This conclusion is also supported by "the North Carolina Adult Medicaid Manual, which is an 'internal instructional reference for DHHS employees in the application of DHHS policy and interpretation of the federal Medicaid requirements.' " *Joyner v. N.C. HHS*, 214 N.C. App. 278, 288, 715 S.E.2d 498, 505 (2011) (quoting *Martin v. N.C. Dep't. of Health and Human Servs.*, 194 N.C. App. 716, 720, 670 S.E.2d 629, 633 (2009)). Medicaid Manual § 2230 I.A. states that for purposes of determining an applicant's eligibility for Medicaid, resources are financial assets that an applicant "owns, or has the right, authority, or power to convert to cash" and that are "legally available for the [applicant's] support and maintenance." Medicaid Manual § 2230 IV.A.2. specifies that "[r]esources are considered available unless the [applicant] shows evidence of legal restraints such as judgments, estates, boundary disputes or legally binding agreements."

C. Medicare Secondary Payer Act and WCMSAs

The instant case also requires consideration of the Medicare Secondary Payer Act. "Medicare is a federal program providing subsidized health insurance for the aged and disabled. *See* 42 U.S.C. § 1395 *et seq.*" *Almy v. Sebelius*, 679 F.3d 297, 299 (4th Cir. Md. 2012), *cert. denied*, __ U.S. __, 184 L. Ed. 2d 653 (2013).

> For the first fifteen years, Medicare paid for medical services without regard to whether they were also covered by an employer group health plan. However, in 1980, Congress enacted a series of amendments, commonly referred to as the Medicare Secondary Payer ("MSP") provisions, which were designed to make Medicare a "secondary payer" with respect to such a plan.

Wilson v. United States, 405 F.3d 1002, 1005 (Fed. Cir. 2005). One of these provisions is 42 U.S.C. § 1395y(b)(2)(A)(ii) (2015), which states that Medicare coverage is not available if "payment has been made or can reasonably be expected to be made under a workmen's compensation law[.]" In order to comply with the MSP statute, in workers' compensation cases, "CMS mandates the creation of a Medicare "set aside" ("MSA") account. 42 C.F.R. § 411. The purpose of a MSA is to allocate a

portion of a workers' compensation award to pay potential future medical expenses resulting from the work-related injury so that Medicare does not have to pay." *Aranki v. Burwell*, 151 F. Supp. 3d 1038, 1040 (D. Ariz. 2015). A WCMSA "is a financial agreement that allocates a portion of a workers' compensation settlement to pay for future medical services related to the workers' compensation injury[.] . . . These funds must be depleted before Medicare will pay for treatment related to the workers' compensation injury[.]" Workers' Compensation Medical Set Aside Arrangements, https://www.cms.gov. The funds in a WCMSA must be deposited into an interest-bearing account, and the WCMSA may be administered by the workers' compensation claimant or by a professional administrator. The administrator must submit an annual accounting of any expenditures from the WCMSA. If funds in a WCMSA are used for any purpose other than medical expenses that arise from the claimant's compensable injury and would otherwise be payable by Medicare, then Medicare will refuse to pay for any medical expenses that were intended to be covered by the WCMSA until the claimant has replaced the funds and has then depleted them according to the WCMSA. *See* WCMSA Reference Guide, https://www.cms.gov/.

IV. Discussion

Petitioner argues that the funds in the WCMSA are not a countable resource for purposes of determining her eligibility for Medicaid, because her use of the funds for her support and maintenance is subject to "legal restrictions" pursuant to a "legally binding agreement." We agree.

In this case, the Industrial Commission entered an order that incorporated the settlement agreement reached by petitioner and her employer and stated that:

> After giving due consideration to all matters involved in this case in accordance with Chapter 97, G.S. 97-17 . . . the compromise settlement agreement is deemed by the Commission to be fair and just[.] . . . The agreement is incorporated herein by reference and is approved[.] . . . $46,484.12 shall be paid by Defendants to fund Plaintiff's Medicare Set-Aside Account. . . . It is to be noted, however, that this Order does not purport to approve, resolve or address any issue or matter over which the Industrial Commission has no jurisdiction[.]

The Settlement Agreement that was incorporated into the Commission's order provided, as relevant to this appeal, the following:

. . .

The parties to this agreement hereby waive further hearings before the North Carolina Industrial Commission and, in presenting this Agreement for approval, represent that they have made available to the Commission with said Agreement all material medical and rehabilitation reports known to exist.

. . .

Since the date on which [petitioner] sustained an injury by accident . . . [she] has not returned to a job or position at the same or greater average weekly wage as she had on that date.

. . .

[Petitioner's] Workers' Compensation Claim has been accepted by Employer and Carrier. [Petitioner] is receiving social security disability benefits. The parties have agreed to settle [petitioner's] workers' compensation claim for the lump sum of [amount is blacked out] subject to the attribution set forth below.

. . .

The defendants agree to fund a Medicare Set Aside account in the amount of $46,484.12. These funds are for future medical treatment related to [petitioner's] compens[able] injuries.

. . . .

The parties agree that the cost of future medical care is in dispute. As a compromise, the Parties agree in addition to the settlement amount listed above [amount blacked out], [that] $46,484.12 (hereinafter referred to as "MSA Fund") shall be allocated to release [petitioner's employer and carrier from] all liability for future Medicare-covered medical expenses[.]

. . .

It is not the intention of the Employer or the Carrier to shift responsibility [for] future medical benefits to the Federal Government. The MSA Fund for future Medicare-covered

expenses is intended directly for payment of these expenses. Upon receipt of tangible evidence that the Medicare-covered expenses exceed the MSA Fund, those expenses will be forwarded to Medicare for payment of covered expenses with proper documentation, provided [petitioner] satisfies all of the Medicare program requirements at that time.

. . .

[Petitioner] understands and agrees that she is administering the Medicare Allocation as a self-administered plan[.]

. . .

A. [Petitioner] shall open an interest bearing bank account for the Medicare Allocation and shall disburse only payments for Medicare-covered expenses which are work related from said account.

B. [Petitioner] shall not pay non-Medicare-covered expenses from this account[.] . . .

C. [Petitioner] shall not pay any Medicare-covered expenses from this account that are unrelated to the work injury.

. . .

F. If payments from this account are used to pay for services that are not covered by Medicare, Medicare will not pay injury-related claims until these funds are restored to the set-aside account and then properly exhausted. In this circumstance, [petitioner] is responsible for restoring such funds to the account.

. . .

I. Even if [petitioner] is a Medicare Beneficiary, [petitioner] understands that Medicare will not pay for any expenses related to the work injury until, and unless, the [petitioner] can provide documentation indicating that the entire MSA account, including any accrued interest, was properly expended on Medicare-covered treatments and expenses related to the work injury covered by this Settlement Agreement.

> J. [Petitioner] must maintain accurate records of all expenses made from the Medicare Allocation[.] . . .
>
> K. [Petitioner] must prepare and submit an annual report to . . . include summaries of any transactions on, and status of, the MSA account.

"Settlement agreements between the parties, approved by the Commission pursuant to N.C.G.S. § 97-17, are binding on the parties and enforceable, if necessary, by court decree." *Saunders v. Edenton Ob/Gyn Ctr.*, 352 N.C. 136, 139, 530 S.E.2d 62, 64 (2000) (citing *Pruitt v. Publishing Co.*, 289 N.C. 254, 258, 221 S.E.2d 355, 358 (1976) (" . . . [I]t has been uniformly held that an agreement for the payment of compensation, when approved by the Commission, is as binding on the parties as an order, decision or award of the Commission unappealed from, or an award of the Commission affirmed upon appeal."). "The Commission or any member or deputy thereof shall have the same power as a judicial officer . . . to hold a person in civil contempt . . . for failure to comply with an order of the Commission, Commission member, or deputy." N.C. Gen. Stat. § 97-80(g) (2015). We conclude that the Commission's order is a legally binding agreement.

Petitioner produced evidence that, pursuant to the terms of a Settlement Agreement that was incorporated into an order of the Industrial Commission, she may *only* use the funds in the WCMSA for (1) medical expenses (2) arising from her compensable injury (3) for which Medicare would otherwise be liable. If petitioner uses the WCMSA funds for any other purpose, Medicare will not pay for treatment for her compensable injury until she replaces the funds and then depletes them in accordance with the WCMSA. Specifically, petitioner *may not* use the funds in the WCMSA for her general support and maintenance. In addition, petitioner could be held in contempt of court for violating the terms of the Commission's order which incorporated the WCMSA. We hold that because petitioner established that the terms of a "legally binding agreement" impose "legal restrictions" on her use of the WCMSA funds, the trial court erred by affirming the agency decision of DHHS that treated the WCMSA as a countable resource for purposes of determining petitioner's eligibility for Medicaid. In reaching this conclusion, we have carefully considered respondents' arguments for a contrary result, but do not find them persuasive.

Respondents argue that the WCMSA is a countable resource on the grounds that petitioner's access to the WCMSA funds is not restricted by the bank in which the funds are deposited. We conclude that this fact

is not relevant to the determination of whether petitioner's use of the funds is restricted pursuant to a legally binding agreement.

Respondents also direct our attention to § 2330 of the North Carolina Adult Medicaid Manual, which discusses the financial resources of an applicant for Medicaid. As discussed above, § 2330 IV.A.2. states that the financial assets of an applicant "are considered available unless the [applicant] . . . shows evidence of legal restraints such as judgments, estates, boundary disputes, or legally binding agreements." A settlement agreement that is incorporated into an order of the Industrial Commission is binding on the parties involved, and is an order that is enforceable by court decree or contempt proceedings. Accordingly, the order, and the WCMSA that is a part of the order, is by definition a "legally binding agreement."

Respondents do not dispute these facts; instead their argument is based on language found in § 2330 IV.C. of the Medicaid Manual. § 2330 IV.C.2. states that "[a]ssets may not be available if there is a pre-existing agreement in which the [applicant] holds assets for another party but does not have an ownership interest. The pre-existing agreement is called a 'resulting trust' or is sometimes referred to as a 'legally binding agreement.' " Respondents' position is that because the Manual includes the phrase "legally binding agreement" in its discussion of resulting trusts, the *only* type of legally binding agreement that might impose legal restrictions upon an applicant's use of funds is a "resulting trust." This argument is without merit, for several reasons.

First, it is not clear why respondents employed the phrase "legally binding agreement" in conjunction with its discussion of a resulting trust.

> Trusts are classified in two main divisions: express trusts and trusts by operation of law. . . . [A]n express trust is based upon a direct declaration or expression of intention, usually embodied in a contract; whereas a trust by operation of law is raised by rule or presumption of law *based on acts or conduct, rather than on direct expression of intention*. . . . [T]he creation of a resulting trust involves the application of the doctrine that valuable consideration rather than legal title determines the equitable title resulting from a transaction[.]

Bowen v. Darden, 241 N.C. 11, 13, 84 S.E.2d 289, 292 (1954) (emphasis added) (citations omitted). "A trust of this sort does not arise from or depend on any agreement between the parties. It results from the fact that one man's money has been invested in land and the conveyance

taken in the name of another." *Teachey v. Gurley*, 214 N.C. 288, 292, 199 S.E. 83, 86-87 (1938).

Thus, a resulting trust is an equitable remedy that is applied in appropriate factual circumstances notwithstanding the *absence* of any express or binding agreement between the parties. Respondents do not cite any authority for their position that "legally binding agreement" is a synonym for a "resulting trust," and do not explain their use of the phrase "legally binding agreement" in the discussion of resulting trusts. In addition, although respondents assert that "for Medicaid purposes" a legally binding agreement must meet the definition of a resulting trust, they do not contend that the Manual includes among its enumerated definitions a definition of the phrase "legally binding agreement" that supports their position.

Moreover, even assuming, *arguendo*, that respondents employ an internal definition of the term "legally binding agreement" as being synonymous with "resulting trust," this would not change the outcome of this case. Respondents concede that in North Carolina an applicant's eligibility for Medicaid is determined in accordance with SSI regulations. As discussed above, both the federal and state regulations provide that a financial asset is not a countable resource if an applicant's use of funds for support and maintenance is subject to legal restrictions arising from a legally binding agreement. In the event of a conflict between the Manual and federal regulations, our decision would be governed by the SSI regulations:

> The principal authority upon which DHHS relied in concluding that [petitioner is not eligible for Medicaid benefits] was the North Carolina Adult Medicaid Manual, which is an "internal instructional reference for DHHS employees in the application of DHHS policy and interpretation of the federal Medicaid requirements." . . . Although the provisions of the Medicaid Manual are clearly entitled to some consideration in attempts to understand the rules and regulations governing eligibility for Medicaid benefits, we have previously stated that the Medicaid Manual "merely explains the definitions that currently exist in federal and state statutes, rules and regulations" and that "[v]iolations of or failures to comply with the MAF [Medicaid] Manual [are] of no effect" unless the act or omission in question amounts to a "failure to meet the requirements set out in the federal and state statutes and regulations[.]"

Joyner, 214 N.C. App. at 288-89, 715 S.E.2d at 505-06 (quoting *Martin*, 194 N.C. App. at 720, 670 S.E.2d at 633, and *Okale v. N.C. Dept. of Health and Human Servs.*, 153 N.C. App. 475, 478-79, 570 S.E.2d 741, 743 (2002)) (other citations omitted). "[I]n the event of a conflict between federal and state Medicaid statutes, the federal statutes must be deemed controlling." *Joyner* at 284, 715 S.E.2d at 503. Given that N.C. Gen. Stat. § 108A-58.1(l)(1) explicitly states that "[t]his section shall be interpreted and administered consistently with governing federal law" we will not adopt the interpretation of "legally binding agreement" proposed by respondents, as it would place North Carolina out of compliance with the applicable federal regulations.

Respondents also assert that the funds in the WCMSA are a countable resource on the grounds that the Industrial Commission order is not "binding" upon respondents and, as a result, does not constitute a legally binding agreement. Respondents offer no basis for their suggestion that a binding agreement must be "binding" upon DHHS. In addition, respondents emphasize that the order includes language acknowledging that the determination of petitioner's eligibility for needs-based entitlement programs is not within the jurisdiction of the Industrial Commission. We hold that the fact that the Industrial Commission's order states, accurately, that it does not purport to address issues outside its jurisdiction, has no bearing on the issues of whether the settlement agreement was binding upon petitioner, or upon whether it imposed legal restrictions on petitioner's use of the WCMSA funds.

Respondents also maintain that the WCMSA "is clearly a type of Medical Health Savings Account funded by Medicare."

> When Congress enacted the Medicare Prescription Drug, Improvement, and Modernization Act in 2003, it created, among other things, a new type of tax-favored account -- an HSA -- to help eligible individuals save for medical expenses. . . . An individual can make contributions to an HSA only if that individual is separately covered by a 'high deductible health plan,' which is a health plan that requires beneficiaries to pay a certain amount of out-of-pocket expenses before the insurance plan begins picking up the tab.

Roup v. Commer. Research, LLC, 349 P.3d 273, __ (Colo. 2015), *cert. denied*, __ U.S. __,, 193 L. Ed. 2d 723 (2016). Respondents fail to articulate any legal basis for their argument that a WCMSA is "a type of" HSA, and we conclude that this argument lacks merit.

For the reasons discussed above, we conclude that the Industrial Commission's order was a legally binding agreement, and that the WCMSA, which was incorporated into the order, barred petitioner from using the funds in the WCMSA for her support or maintenance. We hold that petitioner established that her use of the WCMSA funds was subject to legal restrictions arising from a legally binding agreement, and that the trial court erred by affirming respondents' ruling that the WCMSA was a countable resource. Having reached this conclusion, we find it unnecessary to address certain issues raised by the parties on appeal, including the degree of deference that should be accorded to a CMS memorandum, whether petitioner might have chosen to create a special needs trust instead of a WCMSA, or whether the trial court made its own findings of fact. We conclude that the WCMSA is not a countable resource for purposes of determining petitioner's eligibility for Medicaid, and that the trial court's order must be

REVERSED.

Judges STROUD and McCULLOUGH concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 15 NOVEMBER 2016)

CLICK v. LEANDRO No. 15-913	Hoke (14CVS319)	Affirmed in part; Reversed in Part and Remanded in Part
DARDEN v. DEP'T OF PUB. SAFETY No. 16-337	Office of Admin. Hearings (15OSP5439)	Affirmed
GERSING v. ACCETTURO No. 16-273	Avery (14CVS181)	Affirmed
GUIDOTTI v. MOORE No. 16-14	Bladen (15CVS108)	Reversed in part and dismissed in part.
HUNTER v. NIBLACK No. 16-231	Cleveland (15CVS76)	Affirmed.
IN RE A.G. No. 16-687	Scotland (15J12)	Vacated and Remanded
IN RE C.W.G. No. 16-598	Cleveland (14JT24)	Affirmed
IN RE D.P. No. 16-529	Guilford (15JA169) (15JA170)	Affirmed in part; reversed in part; remanded.
IN RE ESTATE OF LISK No. 15-1317	Anson (15E35)	Affirmed
IN RE G.H.W. No. 16-541	Wake (14JT238-239)	Affirmed
IN RE J.B. No. 16-585	Wake (15JA262-263)	Affirmed
IN RE J.M-C. No. 16-485	Cabarrus (11JB76)	Affirmed in Part; remanded in Part; Dismissed in Part.
IN RE K.D. No. 16-546	New Hanover (15JA260)	Affirmed in part, reversed and remanded in part
IN RE K.D.M.H. No. 16-457	Guilford (12JT42)	Affirmed

IN RE K.R. No. 16-583	Guilford (15JA212) (15JA213)	Affirmed
IN RE L.S. No. 16-664	Wayne (15JA119-122)	Affirmed in part; reversed in part
IN RE M.C. No. 16-171	Mecklenburg (15SPC4646)	Affirmed
IN RE M.F.B. No. 16-388	Guilford (15JA44-47)	Affirmed
IN RE M.J.H. No. 16-371	Ashe (14JT34)	Affirmed
IN RE S.I.P. No. 16-208	Cleveland (14JT29) (14JT69)	Affirmed
IN RE T.S. No. 16-587	Forsyth (12JT209)	Affirmed
IN RE W.C.D. No. 16-351	Wake (14JT227)	Affirmed
JOHNSON v. N.C. VETERINARY MED. BD. No. 15-1278	Cumberland (14CVS7161)	Affirmed
LEE v. MOORE No. 16-415	Bladen (15CVS334)	Affirmed
LEWIS-SOLAR v. TOWN OF BEECH MOUNTAIN No. 16-321	Watauga (15CVS330)	Affirmed
PARKER v. W. PHARM. SERVS. No. 16-447	N.C. Industrial Commission (13-745623)	Affirmed
SANDHILL AMUSEMENTS, INC. v. SHERIFF OF ONSLOW CTY. No. 16-390	Onslow (13CVS3705)	Affirmed
SEC. NAT'L INVS., INC. v. RICE No. 16-215	Cumberland (14CVS9498)	Reversed and Remanded
SPITZER-TREMBLAY v. WELLS FARGO BANK, N.A. No. 16-334	Orange (15CVS1063)	Affirmed

STATE v. APPLEWHITE No. 16-335	Wilson (12CRS2215) (12CRS2218-19)	No error in part; remanded in part
STATE v. BAGLEY No. 16-262	Durham (13CRS59100)	No Error
STATE v. BLAKE No. 16-348	Union (14CRS56132) (14CRS56133)	No Error; Dismissed without Prejudice in Part
STATE v. BUTLER No. 16-412	Guilford (14CRS90317)	No Error
STATE v. BYNES No. 16-245	Greene (13CRS50223) (14CRS50-51) (14CRS53)	No Error
STATE v. CARLISLE No. 16-228	Wayne (13CRS50278)	Affirmed
STATE v. COKER No. 16-180	Wake (12CRS217205-06)	Affirmed in part; Vacated and remanded in part.
STATE v. COURTNEY No. 16-366	Wake (14CRS1278)	Reversed and Remanded.
STATE v. EUBANKS No. 16-251	Orange (12CRS51841)	No Error
STATE v. FARROW No. 16-450	Hyde (15CRS50006) (15CRS63)	Remanded
STATE v. FLOOD No. 16-252	Alamance (07CRS15377) (07CRS56309)	No Plain Error
STATE v. JEFFREYS No. 16-285	Edgecombe (13CRS51079)	No Error
STATE v. LOCKLEAR No. 16-179	Catawba (14CRS53308)	No Error
STATE v. MELVIN No. 15-1323	Mecklenburg (13CRS218339-40)	NO PLAIN ERROR
STATE v. POWELL No. 16-499	Catawba (15CRS1455)	AFFIRMED IN PART, REMANDED IN PART.

STATE v. TURNER No. 16-214	Rutherford (13CRS51105)	No Error
SWOFFORD, INC. v. FISHER No. 16-145	Rockingham (10CVD543)	AFFIRMED IN PART, DISMISSED IN PART.

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